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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 171

THE UNITED STATES OF AMERICA, PETITIONER

vs.

OKLAHOMA GAS & ELECTRIC COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 23, 1942
CERTIORARI GRANTED OCTOBER 12, 1942

SUPREME COURT OF THE UNITED STATES

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THE UNITED STATES OF AMERICA, PETITIONER

vs.

OKLAHOMA GAS & ELECTRIC COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

INDEX

90872—42——1

A [Caption omitted.]

1 In United States Circuit Court of Appeals for the Tenth Circuit

No. 2390

UNITED STATES OF AMERICA, APPELLANT
vs.
OKLAHOMA GAS & ELECTRIC COMPANY, A CORPORATION, APPELLEE

Statements of points upon which appellant intends to rely on appeal, and designation of parts of the record necessary for the consideration thereof

Filed September 29, 1941

The appellant, the United States of America, for its statement of the points upon which it intends to rely upon appeal, adopts its statement of such points set forth and contained in the original transcript of the record of the above entitled cause as certified by the Clerk of the United States District Court, and now on file in the office of the Clerk of the above entitled court.

Appellant designates the entire certified record as being necessary for the consideration of its said points, and asks that the certified record, together with this statement and designation, be printed in its entirety.

GEO. H. MCELROY,
Assistant United States Attorney,
Attorney for Appellant.

Service is hereby acknowledged of the above Statements of Points Upon Which Appellant Intends to Rely on Appeal, and Designation of the Parts of the Record Necessary for the Consideration Thereof, this 26th day of September 1941.

RAINEY, FLYNN, GREEN & ANDERSON,
B. M. RAINEY, JR.,
Attorneys for Appellee.

[File endorsement omitted.]

2 In District Court of the United States for the Western District of Oklahoma

No. 482—Civil

UNITED STATES OF AMERICA, PLAINTIFF

vs.

OKLAHOMA GAS & ELECTRIC COMPANY, A CORPORATION, DEFENDANT

Complaint

Filed June 18, 1940

Comes now the plaintiff, the United States of America, and for cause of action against the defendant Oklahoma Gas & Electric Company, a corporation, alleges and states:

1. That the United States of America is the owner of the following described real estate, situated in the Western District of Oklahoma, to wit:

The North Half ($N\frac{1}{2}$) of the Northeast Quarter ($NE\frac{1}{4}$) of Section Thirty-one (31), Township Eleven (11) North, Range Three (3) East of the Indian Meridian in Pottawatomie County, Oklahoma,

and at all times herein mentioned has held and now holds the title thereto in trust for She-pah-tho-quah, Mexican Kickapoo Indian Allottee No. 193 or for her heirs, as hereinafter more fully alleged.

2. That the Oklahoma Gas and Electric Company is a corporation, organized and existing under and by virtue of the laws of the State of Oklahoma, with it principal place of business at Oklahoma City, Oklahoma.

3. That this is a suit of a civil nature arising under the laws of the United States and is a case of actual controversy; that plaintiff by this complaint seeks a declaratory
3 judgment pursuant to Section 274 (a) of the Judicial Code as amended (U. S. C. A. Title 28, Section 400) and a mandatory injunction.

4. Plaintiff alleges that heretofore there was deposited in the General Land Office of the United States a schedule of allotments of land dated June 18, 1894, from the Acting Commissioner of Indian Affairs, approved by the Acting Secretary of the Interior on September 12, 1894, in conformity with the agreement with the Kickapoo Indians in Oklahoma Territory, ratified and confirmed by the Act of Congress approved March 3, 1893, whereby She-pah-tho-quah was allotted the following described land, to wit:

The North Half (N½) of the Northeast Quarter (NE¼) of Section Thirty-one (31), Township Eleven (11) North, Range Three (3) East of the Indian Meridian in Pottawatomie County, Oklahoma;

That on the 6th day of October, 1894, a trust patent was issued to said allottee for said lands, containing the provision, under the laws then in force, that the United States of America did and would hold the land thus allotted to said She-pah-tho-quah, (subject to all restrictions and conditions contained in the Fifth Section of the Act of Congress of February 8, 1887) in trust for said allottee for a period of twenty-five years, or in case of her decease, for the sole use of her heirs, according to the laws of the state or territory where such land is located, and that at the expiration of said trust period the United States would convey said land by patent in fee to said Indian of her heirs, discharged of said trust and free of all charges and encumbrances, provided that the President of the United States might in his discretion extend such trust period. A copy of said trust patent is hereto attached, marked Exhibit "A" and made a part hereof.

Thereafter and on February 27, 1919, Woodrow Wilson, then President of the United States by executive order extended the trust period on allotments made to Mexican Kickapoo Indians in Oklahoma which would expire during the calendar year 1919, for a period of five years, a copy of which executive order is hereto attached, marked Exhibit B and made a part hereof. On June 19, 1924, Calvin Coolidge by executive order further extended said trust period for a period of ten years, and on December 15, 1933, Franklin D. Roosevelt by executive order further extended said trust period for the term of ten years from the date on which said trust would otherwise expire. Copies of said last two mentioned executive orders are hereto attached, marked Exhibits C and D, respectively, and made a part of this complaint.

5. That said She-pah-tho-quah departed this life on the 28th day of July 28, 1911, and on the 30th day of March 1912, in heirship proceedings involving her estate, duly approved by the Secretary of the Interior, the following-named persons were determined to be the sole heirs of She-pah-tho-quah, deceased, and to inherit the land above described, in accordance with the laws of the state of Oklahoma, in the shares set opposite their names:

Wah-pe-pah, surviving husband, 1/3
Mah-che-me-she-kah, surviving child 2/9;
Na-o-toke, surviving child, 2/9;
Ke-sh-tam-oke, surviving child, 2/9;

6. That said Wah-pe-pah departed this life, intestate, on October 4, 1935, and on June 10, 1936, in an order determining heirs duly

made and entered by the Secretary of the Interior, the following-named persons were determined to be the sole heirs of Wah-pe-pah, deceased, and to inherit the one-third interest of Wah-pe-pah in the land above described in the shares set opposite their names, to wit:

Mah-squa-ke, surviving widow, 1/5;
Pa-ko-to-mo-quah, surviving daughter, 1/5;
Frank Wapepah (Mah-che-me-she-kah) surviving son, 1/5;
James Wahpepah (Na-o-toke) surviving son 1/5;
Fred Wahpepah (Ke-ah-ta-moke) surviving son 1/5;

7. That the land hereinabove described by reason of said heirship proceedings and the executive orders extending said trust period, as above alleged, is now held in trust for the following-named persons in the shares set opposite their names, to wit:

Mah-squa-ke, 1/5 of 1/3 or 3/45
Pa-ko-to-mo-quah, 1/5 of 1/3 or 3/45
Frank Wapepah (Mah-she-me-she-kah) 2/9 plus 3/45 or 13/45
James Wapepah (Na-o-toke) 2/9 plus 3/45 or 13/45
Fred Wahpepah (Ke-ah-to-moke) 2/9 plus 1/5 or 13/45

8. That on or about the 15th day of October, 1936, the defendant Oklahoma Gas and Electric Company, a corporation, erected its transmission line for the transmission of electric current, and placed upon said land eight poles for the carrying of its electrical wires across a portion of said land hereinabove described, but more particularly described as follows:

Beginning at the NW Corner of said N/2 NE/4 thence south along the west line of said N/2 NE/4 a distance of 40 feet thence southeasterly on a curve to the right having a radius of 1106.3 feet a distance of 573 feet thence S 56° 50' E a distance of 2004.3 feet to a point on the south line of said N/2 NE/4 thence east along said south line a distance of 150 feet thence S 56°56' W, a distance of 2139.3 feet a distance of 360 feet to a point on the north line of said N/2 NE/4 thence west along said north line a distance of 250 feet to point of beginning containing 4.06 acres, more or less, in addition to present right-of-way.

That the erection of said transmission line across said land was done without the consent of the United States of America and was not in compliance with the laws of the United States applicable thereto, and the regulations of the Secretary of the Interior promulgated pursuant to said laws, and that although the defendant corporation has been repeatedly requested to make proper application to the Secretary of the Interior for authority to erect and maintain said power line across the land hereinabove described, the said defendant has wholly failed, neglected and refused to do so.

9. Plaintiff further alleges that by the construction of the above described unauthorized transmission line across the said property, plaintiff has suffered damages in the amount of Forty ($40.00) Dollars (or eight (8) poles at $5.00 a pole), which the said defendant has wholly refused to pay.

6 Wherefore, premises considered, plaintiff prays that this court adjudge:

1. That the erection of an electric line for the transmission of power for private, commercial purposes across the above described land, held in trust by the United States for the heirs of the deceased allottee She-pah-tho-quah, constitutes an unwarranted use and servitude of said property, and that this court declare that said company has no easement over said land, or any interest in said land, and no right or authority to erect a power transmission line thereupon.

2. That a mandatory injunction issue requiring said defendant to remove said poles and lines from said above described property.

3. That plaintiff have judgment herein against the defendant for the sum of Forty ($40.00) Dollars, for the costs of this action, and for all further proper relief in the premises.

GEO. H. MCELROY,
Assistant United States Attorney.

[File endorsement omitted.]
[Exhibits do not appear in typewritten record.]

In United States District Court

Answer

Filed July 6, 1940

Comes now the defendant, Oklahoma Gas and Electric Company, a corporation, and for its answer to the complaint of the plaintiff, The United States of America, filed in this cause, states and alleges:

I

That this defendant is a corporation, duly incorporated under the laws of the State of Oklahoma, and is now and was at all times mentioned in plaintiff's petition manufacturing and furnishing electricity and electrical current to a large number of consumers thereof in the State of Oklahoma as a public utility, including

7 cities and towns, communities and other municipal subdivisions of the State of Oklahoma, and private individuals

and corporations within the State of Oklahoma for use of said municipal corporations, communities, private corporations and individuals in lighting streets, buildings and for use of industrial and domestic consumers thereof in such cities and towns and also various state and federal institutions in the state; that on account of the extent and size of its said business in so manufacturing and furnishing such electricity and electrical current, it was and is necessary that this defendant erect, construct and maintain its poles, wires and other electrical equipment upon and over various state highways within the State of Oklahoma; that on or about January 1, 1928, pursuant to application duly filed by the State of Oklahoma, in accordance with the laws of the United States, to open and establish a state highway, the Secretary of the Department of Interior, in consideration of the sum of $4,275.00 granted to the State of Oklahoma an easement of way for highway purposes eighty feet wide and approximately 2,577 feet long, over and across the following described land:

The North Half (N/2) of the Northeast Quarter (NE/4) of Section Thirty-one (31) Township Eleven (11) North, Range Three (3) East of the Indian Meridian in Pottawatomie County, Oklahoma,

which said easement is more particularly described as follows:

Beginning at the NW corner of said N/2 NE4 thence south along the west line of said N/2 NE/4 a distance of 40 feet thence southeasterly on a curve to the right having a radius of 1,106.3 feet a distance of 573 feet thence S 56°36' E a distance of 2,004.3 feet to a point on the south line of said N/2 NE/4 thence east along said south line a distance of 130 feet thence N 56° 36' W a distance of 2,139.3 feet a distance of 360 feet to a point on the north line of said N/2 NE/4 thence west along said north line a distance of 250 feet to point of beginning containing 4.66 acres, more or less, in addition to present right of way.

That thereafter, pursuant to said grant to the State of Oklahoma of said easement of way by the United States, the
8 State of Oklahoma did construct and establish a state highway, as a part of its State Highway system, over and along the easement last above described.

II

That subsequent thereto, and on to-wit, the 9th day of October 1928, the State Highway Commission of the State of Oklahoma, acting under and by virtue of the laws of said State, granted to this defendant a license and permit to erect, construct, and maintain a system of wires, poles and other electrical equip-

ment over and along the easement of way for highway purposes, which had theretofore been granted to the State of Oklahoma by the United States of America as above referred to; a copy of said license being marked "Exhibit A," is hereto attached and made a part hereof; that thereafter, pursuant to said license and permit granted to it by the State of Oklahoma, this defendant on or about the 15th day of October 1936, erected its rural service line for supplying electrical current to farmers living adjacent to said highway, and placed upon said above described lands within the confines of the above referred to easement for highway purposes, eight (8) poles for the carrying of its electrical wires; that the erection of said transmission line across said land and along said highway easement was done with the consent and permission of the State Highway Commission of the State of Oklahoma, and pursuant to the laws of the State of Oklahoma; that the construction and maintenance of said poles and wires along said highway by this defendant was and is a proper use of said highway as such.

III

That defendant denies that the United States of America has any jurisdiction, authority or control over the easement of way above referred to as having been granted to the State of Oklahoma for highway purposes and denies that the United States of America or the regulations of the Secretary of Interior promulgated pursuant to the laws of the United States have any application to this defendant in the erection of its poles and wires and maintenance thereof upon and over a state highway of
9 the State of Oklahoma; that by reason of the foregoing facts defendant alleges it has a complete and perfect right to its said use of the highway as set forth above, and that neither the United States or the Indians represented by the United States, referred to in plaintiff's bill of complaint, have any right or authority over said easement or to any compensation from this defendant by reason of its use of said highway for the purposes set forth above.

Wherefore, having fully answered, defendant prays that the plaintiff take nothing by its bill of complaint and that this defendant go hence with its costs herein expended.

RAINEY, FLYNN, GREEN & ANDERSON,
Attorneys for Defendant,
735 First National Building,
Oklahoma City, Oklahoma.

[Verification omitted.]
[File endorsement omitted.]

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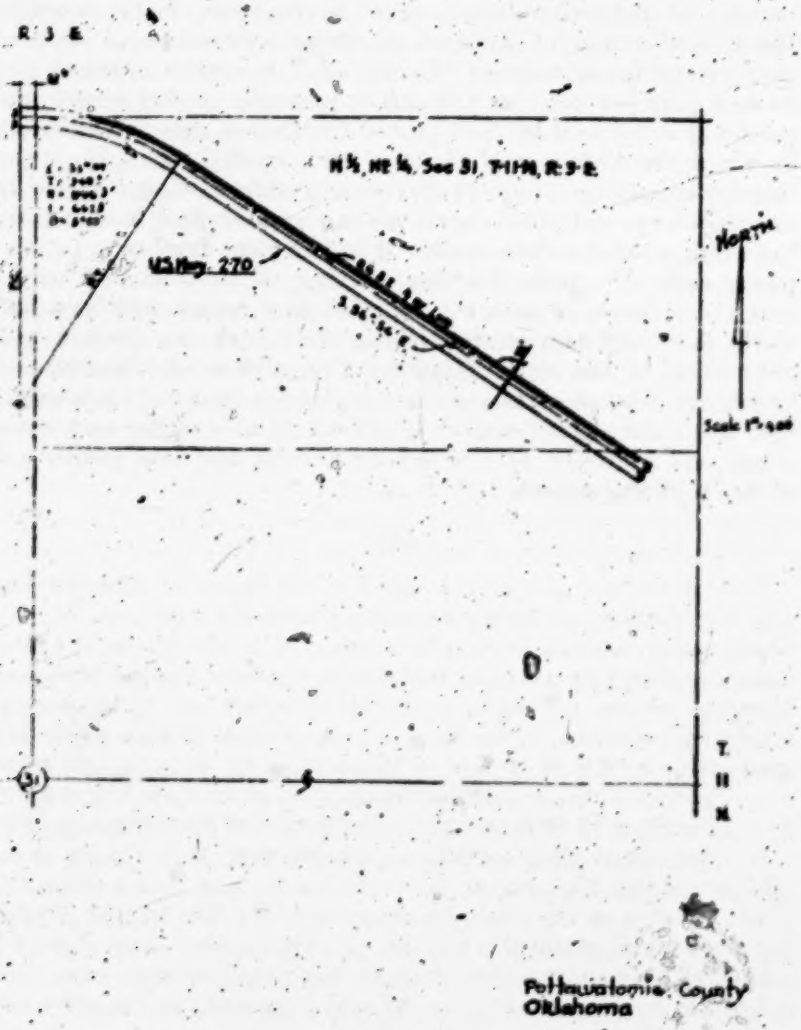

In United States District Court

Stipulation of facts

Filed Oct. 4, 1940

It is stipulated and agreed by and between the parties hereto that the following are agreed facts in this case, but that either

party may introduce other evidence not inconsistent with or contradictory to such facts:

I

Pursuant to the Act of March 3, 1893, c. 203, Art IV, 27 Stat. 557, there was allotted to She-pah-tho-quah, a Kickapoo Indian, allottee No. 193, the following described land:

The North Half (N/2) of the Northeast Quarter (NE/4) of Section Thirty-one (31), Township Eleven (11) North, Range Three (3) East of the Indian Meridian in Pottawatomie County, Oklahoma.

A trust patent dated October 6, 1894, was issued to said allottee. Under the terms of the patent the United States holds the allotted land in trust "subject to all the restrictions and conditions contained" in Section 5 of the Act of February 8, 1887, c. 119, 24 Stat. 388, 389, so that it was inalienable for a period of 25 years, or longer, if that period were extended by the President of the United States. By Executive Order of February 27, 1919, and prior to the expiration of the 25-year period of restriction, the period of restriction against alienation was extended five years; by Executive Order of June 19, 1924, and prior to the expiration of extended period of restriction, the period of restriction against alienation was extended 10 years; by Executive Order of December 15, 1933, and prior to the expiration of the extended period of restrictions, the period of restriction against alienation was extended 10 years to October 6, 1943.

On July 28, 1911 the allottee died; that said land is now held in trust by the United States for the following named heirs of the allottee in the shares set opposite their names:

Mah-squa-ko, 1/5 of 1/3, or 3/45
Pa-ko-to-mo-quah, 1/5 of 1/3 or 3/45
Frank Wapepah (Mah-she-me-she-kah), 2/9 plus 3/45 or 13/45
James Wapepah (Na-o-toke), 2/9 plus 3/45 or 13/45
Fred Wah-epah (Ke-ah-ta-moke), 2/9 plus 1/5 or 13/45

14 II

That the Oklahoma Gas and Electric Company is and was at all times mentioned herein, an operating public utility company, incorporated under the laws of Oklahoma, and engaged in the production, transmission, distribution and sale of electricity in the States of Oklahoma and Arkansas; that said company has been continuously engaged in this business since 1902 in Oklahoma and since 1928 in Arkansas; that the territory served by

the Oklahoma Gas and Electric Company extends through the central part of the State of Oklahoma from the Kansas border on the North, to Texas on the South, and throughout the central part of the state from West to East and it also includes six (6) counties in Western Arkansas; that retail electric service is supplied in 222 communities and contiguous rural and suburban territory; that the company furnishes at wholesale for resale, the entire electric energy requirements of 15 additional communities; that of the total communities served 214 are located in Oklahoma and 23 are located in Western Arkansas; that the estimated aggregate population of the territory served, both retail and wholesale, based on the 1930 federal census, is over 590,000; that the Oklahoma Gas and Electric Company furnishes electric service to various industries, both within and without the above communities served by it, among which said industries are flour mills, grain elevators, oil refineries, cotton mills, cotton gins, stock yards, packing plants, creameries and dairy product plants, glass factories, brick and tile factories, building material plants, furniture factories, machine shops, coal mines, ice plants, railroad shops, and the Oklahoma Railway Company; that in addition thereto said company has constructed and is operating approximately 2,500 miles of rural electric line, furnishing electric service to farms, dairies, and for other agricultural purposes, along and adjacent to public highways within said states.

That on account of the extent and magnitude of its business in so manufacturing and furnishing electricity and electrical current and in order to carry on its business, the defendant has erected, constructed and maintained its poles, wires and other electrical equipment upon and over various state highways within the State of Oklahoma.

III

On July 9, 1926 the State of Oklahoma, through its Highway Commission, applied to the Secretary of the Interior of the United States, petitioning him "to grant permission in accordance with section 4 of the act of March 3, 1901 (31 States. L., 1058, 1084), to open and establish a public highway" across the land described in paragraph No. 1 hereof. The course of the highway was described as follows:

Beginning at the NW corner of said N/2 NE/4 thence South along the West Line of said N/2 NE/4 a distance of 40 feet thence Southeasterly on a curve to the right having a radius of 1,106.3 feet a distance of 573 feet thence S. 56°56′ E. a distance of 2,004.3 feet to a point on the South line of said N/2 NE/4 thence East along

said South line a distance of 150 feet thence N. 56°50' W. a distance of 2,139.3 feet a distance of 360 feet to a point on the North line of said N/2 NE/4 thence West along said North line a distance of 250 feet to point of beginning containing 4.55 acres, more or less, in addition to present right of way.

That said application was duly considered by the said Interior Department. and on June 1, 1927, a claim was filed by the United States on-benalf of the heirs of She-pah-tho-quah in the sum of $1,275.00, as compensation to said heirs for the establishment of said highway across their allotment; that said sum of $1,275.00 was paid by the State of Oklahoma. On January 20, 1928, the Assistant Secretary of the Interior endorsed the following approval on the map of definite location accompanying the application of the State of Oklahoma:

"DEPARTMENT OF THE INTERIOR,
Jan. 20, 1928.

Approved subject to the provisions of the Act of March 3, 1901 (31 Stat. L., 1058–1084), Department regulations thereunder; and subject also to any prior valid existing right or adverse claim.

JOHN H. EDWARDS.
Assistant Secretary."

16 IV

That subsequent thereto and on, to-wit, the 9th day of October 1936 the State Highway Commission of the State of Oklahoma, acting under and by virtue of the laws of said state, granted to the defendant, Oklahoma Gas and Electric Company, a license and permit to erect, construct and maintain a system of wires, poles, and other electrical equipment over and along said highway. A copy of said license from the State of Oklahoma to the defendant, Oklahoma Gas and Electric Company, being marked "Exhibit I" is hereto attached and made a part of this stipulation.

V

That thereafter, pursuant to said license and permit granted to it by the State of Oklahoma, the defendant, Oklahoma Gas and Electric Company, on or about the 15th day of October 1936, erected its rural service line for supplying electrical current to farmers living adjacent to the aforesaid public highway and placed upon the above described lands within the confines of the above referred to highway 8 poles for the carrying of its electrical wires; that the erection of said rural service line along said highway was done with the consent and permission of the State Highway Commission of the State of Oklahoma and pursuant to the

laws of the State of Oklahoma, and in accordance with the standards of construction prescribed by the Corporation Commission of the State of Oklahoma.

That said rural line so constructed is a part and parcel of defendant's system of rural electrification, adjacent to and extending from the City of Shawnee, Oklahoma, used in supplying electricity to its customers.

GEO. H. McELROY,
Asst. United States Attorney,
RAINEY, FLYNN, GREEN & ANDERSON,
Attorneys for Defendant.

17 *Exhibit I to stipulation of facts*

LICENSE

This authority executed in quadruplicate this 9th day of October 1936, by the State Highway Commission, acting for and on behalf of the State of Oklahoma, hereinafter called Commission, witnesseth:

That the Commission does by these presents grant to Oklahoma Gas & Electric Company of Shawnee, Oklahoma, a license to erect, construct and maintain a 4000 volt electric line along, upon or across the hereinafter described state highways for the purpose of transmitting, selling, and using electricity.

Said highways being shown on attached sketch and described as follows, to wit:

Check $5.00 for inspection and sketch showing location. Begining at a point where the north property line of highway 270 intersects the east boundary line of the SW¼ Section 32-11N-3E, Pottawatomie County thence in a northwesterly direction along highway 270 through the SW¼ and the NW¼ of said Section 32 and the NE¼ of Section 31-11N-3E, thence west along the south side of the SW¼ of Section 30-11N-3E in all a distance of one and three tenths miles.

It is understood that the proposed poles will be placed on a line parallel with and 38 ft. Northeast of the center line of highway No. 270.

This authority includes the right to cross all state highways and state roads intersecting any part of the route above described, and said authority also includes the right to maintain the necessary stubs and guy wires and to trim trees when and where necessary for proper clearance, but trees shall not be removed or trimmed without the written approval of the Commission. Said poles, posts, and stubs are to be erected, or pipe lines

installed, under the direction of the Commission and in the manner and locations as approved by him.

For pole lines at all crossings, a clearance above the
18 surface of not less than twenty (20) feet shall at all times be maintained. That said poles, posts and stubs, pipe lines and all fixtures, wires, etc., shall at all times be kept in good repair.

That this license is revocable at will and upon notice of revocation the licensee herein shall at its own expense immediately remove from said highway (or to such new location thereon as may be designated by the Commission) to the satisfaction of the Commission, all poles, posts, stubs, pipes, valves, fixtures, and other property erected and placed upon or under the hereinbefore described highways under the authority contained herein.

That the licensee assumes all liability for any damage to persons or property caused by the construction or maintenance of said poles, posts, stubs, pipes, valves, wires, and other property placed on or under said highway; and agrees to reimburse the State for any and all monies expended by it in repairing any damage to said highway caused by the construction or maintenance of such transmission lines and pipes.

This license is granted subject to any and all claims made by adjacent property owners as compensation for additional burden on such adjacent and abutting property.

Disapproval ----------.

THE STATE HIGHWAY COMMISSION OF OKLAHOMA,
By VAN T. MOON, *State Highway Engineer.*

Approval Recommended:
Date 10-9-26.

B. E. CLARK,
Division Engineer.
J. F. LARCEY,
Engineer of Right of Way.

19 In United States District Court

Opinion

Filed March 6, 1941

The facts in this case are stipulated.

Prior to July 9, 1926, the State of Oklahoma, through its Highway Commission, applied to the Secretary of the Interior of the United States, petitioning him to grant permission in accordance with Section 4 of the Act of March 3, 1901 (31 Stats. L.,

1058, 1084), to open and establish a public highway across certain land, which had been allotted to She-pah-tho-quah, a Kickapoo Indian, allottee No. 193, described as follows:

"The North Half of the Northeast Quarter of Section 31, Township 11 North, Range 3 East of the Indian Meridian in Pottawatomie County, Oklahoma."

The course of the highway was described as follows:

"Beginning at the NW corner of said N/2 NE/4 thence south along the West line of said N/2 NE/4 a distance of 40 feet thence Southeasterly on a curve to the right having a radius of 1,106.3 feet a distance of 573 feet thence S. 56°56' E. a distance of 2,004.3 feet to a point on the South line of said N/2 NE/4 thence East along said South line a distance of 150 feet thence N. 50°56' W. a distance of 2,139.3 feet a distance of 360 feet to a point on the North line of said N/2 NE/4 thence West along said North line a distance of 250 feet to point of beginning containing 4.66 acres, more or less, in addition to present right of way."

The application was duly considered by the Interior Department, and on June 1, 1927 a claim was filed by the United States on behalf of the heirs of the said allottee in the sum of $1,275, as compensation to said heirs for the establishment of said highway across their allotment, and said sum of $1,275 was paid by the State of Oklahoma.

On January 20, 1928, the Assistant Secretary of the Interior endorsed the following approval on the map of definite location accompanying the application of the State of Oklahoma;

20 "DEPARTMENT OF THE INTERIOR,

Jan. 20, 1928.

"Approved subject to the provisions of the Act of March 3, 1901 (31 Stat. L., 1058-1084), Department regulations thereunder; and subject also to any prior valid existing right or adverse claim.

JOHN H. EDWARDS,

Assistant Secretary."

Subsequent thereto and on the 9th day of October 1936, the State Highway Commission of Oklahoma, acting under and by virtue of the laws of said state, granted to the defendant, Oklahoma Gas & Electric Company, a license and permit to erect, construct, and maintain a system of wires, poles, and other electrical equipment over and along said highway. Said license provided:

"That the Commission does by these presents grant to Oklahoma Gas & Electric Company of Shawnee, Oklahoma, a license to erect, construct and maintain a 4,000 volt electric line along, upon or across the hereinafter described state highways for the purpose of transmitting, selling and using electricity."

* * * * *

"This authority includes the right to cross all state highways and state roads interesting any part of the route above described, and said authority also includes the right to maintain the necessary stubs and guy wires and to trim trees when and where necessary for proper clearance, but trees shall not be removed or trimmed without the written approval of the Commission. Said poles, posts, and stubs are to be erected, or pipe lines installed, under the direction of the Commission and in the manner and locations as approved by him."

* * * * * *

"This license is granted subject to any and all claims made by adjacent property owners as compensation for additional burden on such adjacent and abutting property."

It is admitted that the lands through which the highway in question was constructed, were restricted Indian lands.

21 The plaintiff brings this action, seeking a declaratory judgment that the erection of an electric line for the transmission of power for private, commercial purposes across the above described land, held in trust by the United States for the heirs of the deceased allottee, constituted an unwarranted use and servitude of said property, and that this court declare that said company has no easement over said land, and no right or authority to erect a power transmission line thereupon; that a mandatory injunction issue requiring said defendant to remove said poles and lines from said above described property: that the plaintiff have judgment against the defendant for the sum of $40 (or $5 a pole for eight poles erected on the above described property), for the costs of this action, and for all further proper relief in the premises.

There being no controversy over the facts, the only question for determination is whether or not the grant to the defendant by the State Highway Commission is sufficient authority for the defendant to erect its poles and transmission lines on said highway without the consent of the owner of the land through which said highway was constructed.

It is the contention of the plaintiff that in executing the grant to the State Highway Commission of Oklahoma to construct a public highway through said Indian allotment, there was at least an implied understanding that said highway would be used only for the purposes of pedestrians and vehicles, or the ordinary uses of a highway, and that the use of said right of way for the purposes of erecting a transmission line constituted an unwarranted use and servitude of said right of way.

It is the contention of the defendant that when the plaintiff, through its authorized agents, granted a right of way for purposes of constructing a state highway, it did so with full knowledge that

the opening and establishment of the highway would be in accordance with the laws of the State of Oklahoma.

The Act of March 3, 1901, c. 832, sec. 4, 31 Stat. 1084, 25 U. S. C. A. sec. 311, provides:

"The Secretary of the Interior is authorized to grant
22 permission, upon compliance with such requirements as he may deem necessary, to the proper State or local authorities for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated, through any Indian reservation or through any lands which have been allotted in severalty to any individual Indian under any laws or treaties but which have not been conveyed to the allottee with full power of alienation."

The Act of March 4, 1911, c. 238, 36 Stat. 1253, 43 U. S. C. A. sec. 961, provides for the granting of a right of way to individuals or corporations for the erection of electrical poles and lines through Indian reservations. This statute, however, has no application to the present controversy because the defendant did not seek to or erect a line of poles through an Indian reservation other than upon a public highway.

When the government granted the right of way, there were no limitations as to what should constitute the uses of the highway. That was apparently left to the determination of the State of Oklahoma. And the question narrows itself even more to the proposition as to what constitutes legal use of a state highway. Will the legal use be determined by federal law or by state law?

Laws of Oklahoma 1917, c. 230, p. 429, sec. 1, 69 Okl. St. Ann. sec. 4, provides:

"Any person, firm, or corporation organized under the laws of this State, or qualified to do business in this State to furnish light, heat or power by electricity, gas or oil, provided the same shall not apply to interstate pipe lines, shall have the right to use the public roads and highways in this State for the purpose of erecting poles or posts along or across the same, and sustain their wires and fixtures thereon, or to lay under the surface of said roads or highways pipes or conduits for the purpose of selling electricity and gas, or either, for light, heat or power, upon obtaining the consent of the Board of County Commissioners of the county or counties in which the public highways are proposed to be used for such purpose, * * *."

23 This legislative act of the State of Oklahoma was amended by the Laws of 1933, c. 12 p. 31, sec. 6, 69 Okl. St. Ann. sec. 26, which provided for the establishment of the State Highway Commission and granted the said Highway Commission full control and authority over state highways.

The Supreme Court of Oklahoma, in Narworthy v. Illinois Oil Co., 176 Okl. 87, 54 P. (2d) 642, held, quoting from the syllabus:

"The construction and maintenance of an oil pipe line along and under a state highway, constructed and maintained in the manner authorized and provided by law, is not an additional servitude for which compensation must be paid to the owner of abutting land, or to the owner of the land over which the highway was laid."

In this case the court gives an excellent analysis of the development of highways and of the necessity for present day uses of a state highway, which perhaps were not even in contemplation at the time the highways were originally dedicated, and quotes from the Supreme Court of Kansas in McCann v. Johnson County Telephone Co., 76 P. 870, as follows:

"The purpose of the highway is the controlling factor. It is variously defined or held to be for passage, travel, traffic, transportation, transmission, and communication. It is a thoroughfare by which people in different places may reach and communicate with each other. The use is not to be measured by the means employed by our ancestors, nor by the conditions which existed when highways were first devised. The design of a highway is broad and elastic enough to include the newest and best facilities of travel and communication which the genius of man can invent and supply."

And the court furthermore quotes at length from the Supreme Court of Minnesota in Cater v. N. W. Tel. Exchange Co., 60 Minn. 539, 63 N. W. 111, 28 L.R.A. 310, as follows:

"'If there is any one fact established in the history of society and the law itself, it is that the mode of exercising this ease-
24 ment is expansive, developing and growing as a civilization advances. In the most primitive state of society, the conception of a highway was merely a footpath; in a slightly more advanced state it included the idea of a way for pack animals; and next a way for vehicles drawn by animals—constituting, respectfully, the iter, the actus, and the via of the Romans. And thus the methods of using public highways expanded with the growth of civilization until today our urban highways are devoted to a variety of uses not known in former times, and never dreamed of by the owners of the soil when the public easement was acquired. Hence it has become settled law that the easement is not limited to the particular methods of use in vogue when the easement was acquired, but includes all new and improved methods, the utility and general convenience of which may afterwards be discovered and developed in aid of the general purpose for which highways are designed. And it is not material that these new and improved

methods of use were not contemplated by the owner of the land when the easement was acquired, and are more onerous to him than those then in use.' * * *'

"The conclusion reached is that:

"'The construction and maintenance of a telephone line upon a rural highway is not an additional servitude for which compensation must be paid to the owner of the land over which the highway is laid'."

The Oklahoma Court concludes its opinion with the following very pertinent statement:

"When the state constructs a modern highway along or through a tract of land privately owned, the result is often in fact a substantial enhancement of the value of the privately owned tract. Notwithstanding that fact, however, the law presumes damage to the tract and the landowner is compensated for the land taken and used, irrespective of any enhancement of the value. After the highway is constructed it is used generally for travel, transportation, and transmission. As new methods of transportation develop they are used upon the highway, whether that use is by bus, truck or oil pipe line. When the landowner has been compensated for the taking of the highway, it is too difficult to follow a contention that he is additionally damaged by each different, new, or additional use of the highway for travel, transportation, or transmission. We conclude that the use of the highway here under consideration, authorized by specific state statute, enjoyed under specific supervision of the state, is wholly within the primary law of the use of the highway and must be held to be no such additional burden or servitude as would entitle the abutting landowner to additional compensation for such use."

The Nazworthy case was followed by the Supreme Court of Oklahoma in Stanolind Pipe Line Co. v. Winford, 176 Okl. 47, 54 P. (2d) 646, and in Okmulgee Producers & Manufacturers Gas Co. v. Franks, 177 Okl. 456, 60 P. (2d) 771.

In Jafek v. Public Service Co. of Oklahoma, 183 Okl. 32, 79 P. (2d) 813, the Supreme Court quoted from Clayborn v. Tennessee Electric Power Co., 20 Tenn. App. 574, 101 S. W. (2d) 492, 296, with approval, as follows:

"The highway not only serves the needs of the traveling public, but may also lawfully serve the public by furnishing the public the conveniences afforded by public utility companies."

Whether or not the construction of a telephone or telegraph line upon a public highway constituted an additional servitude of said right of way is determined by local law (Barney v. Keokuk, 94 U. S. 324), and has been passed upon by many of the state courts and by three Federal District Courts. The states

of Illinois, Maryland, New Jersey, North Dakota, Ohio, Pennsylvania, and Virginia have held in effect that a telephone or telegraph line is an added burden on a rural highway, entitling an abutting property owner to compensation. The states of Alabama, Kansas, Kentucky, Michigan, Minnesota, Oklahoma, Vermont, and West Virginia have held to the contrary. In the federal courts, Pacific Postal Tel. Cable Co. v. Irvine, (Calif.) (1892), 49 F. 113, and Kester v. Western Union Tel. Co., (N. Y.) (1901), 108 F. 926, it was held that the construction of a telegraph line constituted an additional burden upon the fee
26 of a public highway right of way. In a much later case, however, the Circuit Court for the Northern District of Georgia in 1908, in Southern Bell Telephone & Telegraph Co. vs. Nalley, 165 F. 263, held:

"The construction of a telephone line upon a public county road or highway in the state of Georgia, with the approval of the county authorities in charge of such road or highway, which line is used in the transmission of messages between various points, is not an additional burden or servitude upon such public road, and does not exceed the uses to which the easement in the public can be put by the approval of such county authorities, and an abutting landowner has not the legal right to prevent such use." [Quoting from the headnote.]

In a long line of cases dealing with streets, the federal courts have held without exception that the power to control the use of a public street is vested solely in the municipality. In Owensboro v. Cumberland Telephone Co., 230 U. S. 58, the court held that the original source of power over both streets and highways is the state, but that this power or control is generally delegated in some form to the municipalities and county authorities of the state.

Emphasis is placed by the plaintiff on the concluding paragraph of the license granted to the defendant by the State Highway Commission, which paragraph is as follows:

"This license is granted subject to any and all claims made by adjacent property owners as compensation for additional burden on such adjacent and abutting property."

This, however, does not refer to additional burden upon the right of way. The defendant might erect its poles and construct its line in such a way as to interfere with the entrance from the highway to the adjacent property at the customary point, or it might place the line so near to the adjacent property as to damage growing trees or otherwise interfere with the actual use of the adjacent property. The language, however, of the license is clear and unambiguous.

The plaintiff in its briefs has cited no cases in the Federal courts which limit in any manner the power of the state to determine the uses of public highways.

27 There is no serious contention that the state acquired by this grant from the Secretary of the Interior anything but an easement, but if the grant conveyed the power of the state to use this right of way for highway purposes and the state determined that the use granted to the defendant was a valid and legal use of the public highway, the fact that the state has a mere easement and not a fee would be immaterial.

When the government accepted $1,272 for the use of 4.66 acres of land, there is a strong inference, at least, that the state was paying to the government all that the land was actually worth and, therefore, the government was surrendering any right it had in the land, except in the event that the state ceased to use the land for highway purposes.

Notwithstanding payment of this substantial sum for the small amount of land acquired under the grant, it is the judgment of the court that the state could use the land only for highway purposes; and, in the event it failed to use the land for highway purposes, that the title would revert to the government.

In conclusion, therefore, the court is of the opinion that when the government granted to the State Highway Commission an easement to the right of way for the construction of a public highway, it did so under the Act of Congress of March 3, 1901, supra, "for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated,"; that the state had the power to determine the uses to which said highway would be subject; and that, since by the Laws of Oklahoma 1917, c. 220, supra, the defendant company has the right to construct its line of poles and wires along said highway with the consent of the Highway Commission, and since the Highway Commission has granted authority and permission to the defendant to erect said line, the plaintiff has no right to claim additional compensation for the use of said right of way as a highway for the purposes in question, nor to the injunctive relief sought against the defendant, requiring it to remove its line of poles and wires.

28 Judgment will be rendered for the defendant. Findings of fact, conclusions of law, and a form of judgment, consistent with this opinion, may be submitted within ten days from this date.

EDGAR S. VAUGHT,
United States District Judge.

Dated this 6th day of March 1941.
[File endorsement omitted.]

In United States District Court

Findings of fact and conclusions of law

Filed March 29, 1941

The court finds the facts to be in accord with the stipulation of the parties filed herein, and such stipulation is adopted as the findings of fact of this court.

Conclusions of law

I

That the nature and incidents of the grant or easement acquired by the State of Oklahoma from the United States for a public highway across the restricted Indian allotment in question, and the use and control of such highway, are to be determined by the laws of the State of Oklahoma.

II

That under the laws of the State of Oklahoma the construction, maintenance and operation of an electric transmission line for private and commercial purposes over, along and across public highways in the state is a proper highway use.

III

That the construction, maintenance and operation of an electric transmission line on public highways in the State of Oklahoma does not constitute an additional servitude for which the owners of abutting property are entitled to compensation; and such rule applies to the electric transmission line along the highway crossing the Indian allotment in question.

29

IV

The court finds all issues of law in favor of the defendant Oklahoma Gas and Electric Company and against the plaintiff, United States of America.

To all of which plaintiff excepts and exception is allowed.

EDGAR S. VAUGHT,
District Judge.

[File endorsement omitted.]

In United States District Court

Amended judgment

Filed April 16, 1941

This cause came regularly on to be heard, and the court being fully advised,

It is ordered, adjudged, and decreed, that Plaintiff, United States of America, take nothing and that its petition be and the same is hereby dismissed, and that each party hereto pay its respective costs.

Dated this 16 day of April 1941.

EDGAR S. VAUGHT,

Judge of the United States District Court for the Western District of Oklahoma.

[File endorsement omitted.]

In United States District Court

Notice of appeal

Filed June 26, 1941

Notice is hereby given that the United States of America, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Tenth Circuit from the judgment entered in this action on March 29, 1941, and amended on April 16, 1941.

GEO. H. MCELROY,
Assistant United States Attorney.

(Copy mailed to Rainey, Flynn, Green & Anderson June 26, 1941.)

[File endorsement omitted.]

30 In United States District Court

Order extending time

Filed July 28, 1941

It is this day ordered, for good cause shown, that the time in which the appellant, United States of America, may docket said cause and file a transcript of the record herein in the United

States Circuit Court of Appeals, be and the same is extended to September 24, 1941.

Dated this 28th day of July 1941.

EDGAR S. VAUGHT,
District Judge.

In United States District Court

Statement of points upon which appellant intends to rely on appeal

Filed July 17, 1941

Upon the appeal in the above entitled action, appellant intends to rely on the following points:

1. The permission of the Secretary of the Interior granted in accordance with Section 4 of the Act of March 3, 1901, c. 852, 31 Stat. 1058, 1084, to open and establish a public highway through Indian reservations or allotted lands does not confer the right to erect or maintain electric transmission lines and poles along the highway right of way.

2. The district court erred in entering judgment for defendant.

GEO. H. MCELROY,
Assistant United States Attorney,
Attorney for Appellant.

Service of a copy of the Statement of Points Upon Which Appellant Intends to Rely on Appeal acknowledged this 17th day of July 1941.

R. M. RAINEY, JR.,
RAINEY, FLYNN, GREEN & ANDERSON,
Attorneys for Appellee.

[File endorsement omitted.]

31 In United States District Court

Stipulation designating record on appeal

Filed July 17, 1941

The parties in the above entitled cause hereby designate the following parts of the record which they consider necessary to this appeal:

1. Plaintiff's bill of complaint.
2. Defendant's answer.
3. Stipulation of Facts and Exhibit "I" attached thereto.
4. Opinion filed March 6, 1941.

5. Findings of Fact, Conclusions of Law, and Judgment entered March 29, 1941.

6. Amended judgment entered April 16, 1941.

7. Notice of Appeal filed June 26, 1941.

8. This Designation of Record on Appeal.

9. Statement of Points Upon Which Appellant Intends to Rely on Appeal.

GEO. H. MCELROY,
Assistant United States Attorney,
Attorney for Appellant.

RAINEY, FLYNN, GREEN & ANDERSON,
By R. M. RAINEY, JR.,
Attorneys for Appellee.

(File endorsement omitted.)

[Clerk's Certificate to foregoing transcript omitted in printing.]

And thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Tenth Circuit, viz:

Order of submission

Fourth Day, January Term, Thursday, January 15th, A. D. 1942

Before Honorable ORIE L. PHILLIPS, Honorable SAM G. BRATTON, and Honorable ALFRED P. MURRAH, Circuit Judges

This cause came on to be heard and was argued by counsel, W. Robert Koerner, Esquire, appearing for appellant, Robert M. Rainey, Jr., Esquire, appearing for appellee.

Thereupon this cause was submitted to the court.

March 23, 1942

Before PHILLIPS, BRATTON, and MURRAH, Circuit Judges.

MURRAH, Circuit Judge, delivered the opinion of the court.

We are asked to decide whether the appellee, Oklahoma Gas & Electric Company, herein called electric company, may by permission of the state of Oklahoma, but without permission, or consent, of the Secretary of the Interior, construct and maintain a rural electric line upon and along a state highway, constructed and maintained by the state, a portion of which traverses land allotted in severalty to a restricted Indian of the Kickapoo Tribe, the title to which land is held in trust by the Secretary of the Interior. The highway is constructed across and upon the said Indian land in pursuance of a permit, granted to the state of Oklahoma by the Secretary of the Interior under provisions of section 4 of the Act of March 3, 1901 (31 Stat. 1084, 25 U. S. C. A. 311),[1] which authorizes the Secretary of the Interior to grant a permit to the state to open and establish a highway across Indian land in accordance with the laws of the state, wherein situated. The electric company has not applied for, or secured a permit from the Secretary of the Interior to construct and maintain a rural electric line across the Indian land, or along and upon the right-of-way granted the State, and contends that it is not required to do so.

[1] Section 4 of the Act of March 3, 1901:

"That the Secretary of the Interior is hereby authorized to grant permission, upon compliance with such requirements as he may deem necessary, to the proper State or local authorities for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated, through any Indian reservation or through any lands which have been allotted in severalty to any individual Indians under any laws or treaties but which have not been conveyed to the allottees with full power of alienation."

The question for consideration is the meaning, purpose, and intent to be placed upon section 4 of the 1901 Act, supra, and more precisely, the meaning, purpose, and intent of the Congressional use of the words "for the opening and establishment of public highways in accordance with the laws of the State or Territory in which the lands are situated."

The facts, as stipulated and agreed, show that pursuant to the Act of March 3, 1893, chapter 203, article 4, 27 Stat. 557, the land in question was allotted in severalty to a restricted Kickapoo Indian. The title remained in the United States for the use and benefit of the allottee and was, at the time herein complained of, restricted land held in trust by the Secretary of the Interior for the use and benefit of the heirs of the original allottee. On July 9, 1926, in furtherance of its design to construct a system of highways, the State of Oklahoma, through its Highway Commission, applied to the Secretary of the Interior for permission to open and establish a public highway upon and across the land in question, in accordance with section 4 of the 1901 Act, supra. After such application, together with a map of definite location, had been filed with the Secretary of the Interior, the United States, through the Secretary of the Interior, filed a claim on behalf of the restricted Indians in the sum of $1,275.00, as compensation for the establishment of the highway across and upon the allotment in question, which was by the State of Oklahoma paid to the Secretary of the Interior for the benefit of the restricted Indian heirs.

On January 20, 1928, the Assistant Secretary of the Interior approved the application by endorsing on the map of definite location the following: "Approved subject to the provisions of the Act of March 3, 1901 (31 Stat. L., 1058–1084), Department regulations thereunder; and subject also to any prior valid existing right or adverse claim." The highway was opened and established. Thereafter, and on the 9th day of October 1936, the Highway Commission of the State of Oklahoma, acting under authority of the state laws, granted to the appellee, the electric company, a license and permit to erect, construct, and maintain a system of poles, and other electrical equipment, upon and along the said highway, which included that part of the restricted Indian allotment over which the Secretary of the Interior had granted permission for the establishment of the said highway. Thereafter, and in pursuance of the said license and permit granted by the said Highway Commission, the appellee in constructing its rural electric service line for the purpose of supplying electrical current to adjacent landowners, erected eight poles along and upon that portion of the highway which tra-

versed the allotted land in question, and on which there was installed the necessary power line.

On the theory that the electric company had no authority to install its power lines on that part of the highway, which traversed the restricted allotted land without first having obtained a permit from the Secretary of the Interior, the United States, through the Secretary of the Interior, brought this suit for declaratory adjudication of its asserted rights (28 U. S. C. A. 400), and for a mandatory injunction to remove the poles heretofore erected, and for money judgment in the sum of $5.00 per pole, in the total amount of $40.00.

The electric company contends that the authority granted to the state of Oklahoma by the Secretary of the Interior, under section 4 of the 1901 Act, supra, to open and establish a highway in accordance with the laws of the state, carried with it the authority of the state to grant the electric company a permit to construct its lines along and upon that portion of the highway which traversed the allotted land, and that the Secretary of the Interior had no power or authority to interfere with the same. The electric company's contention was sustained and relief denied by the trial court (37 F. Supp. 347).

In the first instance, the authority to open and establish a state highway across Indian land allotted in severalty to restricted Indians is derived from the federal statute, section 4 of the 1901 Act, and the extent to which that power may be exercised is subject to the limitations placed upon it by the Act itself. Its interpretation and construction is peculiarly within the competence of the federal courts, uninfluenced by any state notions of its meaning and purpose. State or local laws are applicable only to the extent to which they are made applicable by the federal statute, and the extent to which they are made applicable by the federal statute is also a federal question. United States v. Oregon, 295 U. S. 1, 28; Colorado v. Toll, 268 U. S. 228; McKelvey v. United States, 260 U. S. 353, 359; Oklahoma v. Texas, 258 U. S. 574, 595, and Utah Power & Light Company v. United States, 243 U. S. 389. The question, therefore, is to what extent were the state laws made applicable to the opening and establishment of the highway in question, and requires a consideration of the statutory scheme designed to subject lands under the exclusive control of the United States to the construction of highways, electric, telephone and telegraph lines necessary and essential to the needs of an advancing and progressive civilization.

The statute here in question is but a fragment of numerous acts of Congress, which have in various forms granted rights-of-way in the nature of easements across and upon public domain, national

parks, Indian, and other reservations, under the exclusive control of the National Government.[2] It is sufficient to say that each grant, or authorization of a right-of-way upon public domain, or other reservation, has its proper setting in the scheme of national affairs as they relate to progress and development.

Congress authorized the Secretary of the Interior to permit the use of rights-of-way upon lands and national forests of the United States for the purpose of generating, or distributing electric power by the Act of May 14, 1896, 29 Stat. 120, 43 U. S. C. A. 957,[3] but did not mention Indian lands or Indian reservations.

The Act of May 14, 1896, supra, was superseded by the Act of February 15, 1901, 31 Stat. 790, 43 U. S. C. A. 959. Under the provisions of this Act, the Secretary of the Interior is authorized and empowered under general regulations to be fixed by him, to permit the use of rights-of-way through public lands and reservations of the United States for electric plants, poles and lines for generation and distribution of electric power; for telephone and telegraph purposes, and for canals, ditches, pipes and pipe lines, flumes and tunnels or other water conduits. The Act provides the details incident to the granting of the permit and specifically provides that the permission given by the Secretary of the Interior can be revoked in his discretion, and does not confer any right, or easement, or interest in, to or over any reservation. The statute makes use of the word "reservation" without specifically mentioning Indian reservations or Indian lands. It is noticeably silent on Indian lands allotted in severalty.

The Act of February 15, 1901, supra, is contemporaneous with the Act of March 3, 1901, supra (of which section 4 is a part). The Act of March 3, 1901, commonly called sections 3 and 4, has been separately codified as sections 319, 357 and 311, 25 U. S. C. A., and in the Statutes at Large as sections 1083–1084. See United States v. Minnesota, 113 F. 2d 770. Each of these sections of the Act has direct relation to rights-of-way through Indian reservations, tribal lands, and lands allotted in severalty to any individual Indian under any law or treaty.

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[2] Act of July 26, 1866, c. 262, Section 8, 14 Stat. 253, R. S. Section 2477, 43 U. S. C. A. 932; Act of July 5, 1884, c. 24, Section 6, 23 Stat. 104, 43 U. S. C. A. 933; Act of March 3, 1875, c. 152, Sections 1–6, 18 Stat. 482–3, 43 U. S. C. A. 934–5; Act of August 30, 1890, c. 837, Section 1, 26 Stat. 391, 43 U. S. C. A. 945; Act of March 3, 1891, c. 561, Section 18, 26 Stat. 1101, 43 U. S. C. A. 946, as amended March 4, 1917, c. 184, Section 1, 39 Stat. 1197; Act of March 11, 1896, c. 202, Section 2, 30 Stat. 404, 43 U. S. C. A. 951, as amended March 4, 1917, c. 184, Section 2, 39 Stat. 1197; Act of June 26, 1906, c. 3348, 34 Stat. 481, 43 U. S. C. A. 944.

[3] "The Secretary of the Interior is authorized and empowered, under general regulations to be fixed by him, to permit the use of right of way to the extent of twenty-five feet, together with the use of necessary ground, not exceeding forty acres, upon the public lands and national forests of the United States, by any citizen or association of citizens of the United States for the purposes of generating, manufacturing, or distributing electric power."

The first paragraph of Section 3 (31 Stat. 1083, 25 U. S. C. A. 319) empowers the Secretary of the Interior to grant a right-of-way, in the nature of an easement, for the construction, operation, and maintenance of telephone and telegraph lines and offices for general telephone and telegraph business, through any lands held by an Indian tribe or nation in the Indian territory; through any lands reserved for an Indian agency or Indian school, "or through any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation." The Act further provides for the supervision by the Secretary of the Interior over the construction of the telephone lines; provides compensation to be paid therefor, and for a stipulated tax, but the Act does not authorize the Secretary of the Interior to revoke the easement. Neither does the Act mention electric plants, poles, or lines, and it has been held that this section does not authorize the installation or operation of electric lines, upon, across, or through the lands covered thereby. Swendig v. Washington Water Power Company, 265 U. S. 322.

The second paragraph of section 3 of the Act of March 3, 1901, supra (c. 832, Section 3, 31 Stat. 1084, 25 U. S. C. A. 357), specifically authorizes the condemnation of lands allotted in severalty to Indians for any public purpose in accordance with the laws of the State or Territory where located, as other lands, and provides that the money awarded as damages shall be paid to the allottees. United States v. Minnesota, supra. Section 4 of the same Act (31 Stat. 1084, 25 U. S. C. A. 311), is the statute under which the state of Oklahoma obtained permission from the Secretary of the Interior to open and establish the highway in question, over and across the land allotted in severalty to the restricted Indian, in accordance with the laws of the state of Oklahoma.

A consideration of the contemporaneous acts of February 15, 1901, supra, and of March 3, 1901, supra, when considered in their proper setting, leads to the conclusion that Congress intended to treat lands allotted in severalty to restricted Indians separately and apart, and in an entirely different manner, when granting rights-of-way for the construction of public utility lines and highways. Obviously, the power to condemn lands allotted in severalty to an individual Indian did not extend to Indian reservations, tribal lands, national forests, and other lands under the exclusive jurisdiction of the Federal government. As to these lands, only the power to permit the use of a right-of-way under varying forms and conditions was authorized. This view finds practical support in the common knowledge that lands allotted in severalty to Indians in Oklahoma are essentially a part of the

community in which they are situated, and subject to limited control by the state, or its political sub-divisions. The soil is tilled and improvements are constructed thereon, as other lands in the same vicinity. The value is enhanced by these public improvements, including the benefits of rural electrification. Land allotted in severalty is no longer part of the reservation, nor is it tribal land; the virtual fee is in the allottee with certain restrictions on the right of alienation. United States v. Minnesota, supra. Thus a plain and clear distinction is made between the granting of rights-of-way over and across reservations or tribal lands and those allotted in severalty to restricted Indians.

In the acquisition of the right-of-way for highway purposes, the state of Oklahoma had two remedies. First, it was authorized by federal statute (31 Stat. 1084, 25 U. S. C. A. 357) to condemn the right-of-way in accordance with the laws of the state of Oklahoma, thereby vesting in itself a permanent easement, the exact quality of which it is unnecessary here to determine, except it is certain that it would be authorized to permit the use of the same for the purposes which the appellee seeks to subject it. Second, under section 4 (25 U. S. C. A. 311) the Secretary of the Interior was authorized, on application by the state, to grant a permit to open and establish the highway in accordance with the laws of the state. Under this section of the statute, it could acquire a permit to construct a highway across an Indian reservation, which it was not authorized to condemn under 25 U. S. C. A. 357. United States v. Minnesota, supra.

We deem it unnecessary to determine the exact quality of the estate, if any, acquired by the state of Oklahoma by virtue of its permit to construct the highway. It is enough to say that the highway was opened and established in accordance with the laws of the state of Oklahoma, and there is no provision for the revocation for the right-of-way acquired thereunder. There is no good reason for holding that the Secretary of the Interior intended to reserve any powers of supervision, or to impose any limitations upon the opening and establishment of the highway. Rather, the use of the words "in accordance with the laws of the state" negatives any intention of the Secretary to impose any restrictions upon its use beyond the duty of the Secretary to safeguard the use of the right-of-way for purposes not in accordance with the laws of the State.

It must be conceded that the use to which the appellee has subjected the right-of-way in question, under a license from the State Highway Commission, is not in derogation of state law, but is clearly within its intendment, and when measured by the laws of the state, such use does not constitute or impose an additional servitude upon the right-of-way, for which the owner of the

servient estate is entitled to additional compensation. Okmulgee Producers & Manufacturers Gas Company v. Franks, 60 P. (2) 771, and Nazworthy v. Illinois Oil Company, 54 P. 2d 642.

In considering the question of whether such use of the highway constituted an additional burden or servitude which the Secretary of the Interior did not intend to grant, but intended to withhold or control, our decision is not measured or controlled by state notions of what constitutes an additional servitude or a detriment, or a right granted, or the extent thereof, if granted. Yet, we may well consider the reasoning of the decisions of the state of Oklahoma, which have held that a right-of-way acquired for the primary purpose of opening and establishing a highway may also be used, with the permission of the state opening and establishing the same, for the subsidiary purpose of constructing and maintaining telephone, telegraph, electric and pipe lines, without imposing an additional servitude upon the right-of-way. The authorities are collected in Nazworthy v. Illinois Oil Company, supra. The view is wholly compatible with what seems now to be the generally accepted view that a right-of-way acquired for the primary purpose of opening and establishing a highway may also be subjected to the use of public utility lines, with the permission of the State, without imposing an additional burden or servitude upon the servient estate. No case is cited by the Government, and we have found none inconsistent with the reasoning and conclusions of the Oklahoma authorities.

Under the provisions of 25 U. S. C. A. 357 (second paragraph of section 3, 31 Stat. 1084), the appellee could acquire a right-of-way for the construction and maintenance of its lines across any part of the land in question in accordance with the applicable laws of the state of Oklahoma relating to eminent domain. (Laws of 1917, Chapter 230, page 431, Section 3, Compiled Statutes of 1921 Section 6328, 27 O. S. A. 7.) Permission of the Secretary of the Interior is not requisite to the exercise of this power, United States v. Minnesota, supra, although he is an indispensable party to the proceedings. Minnesota v. United States, 305 U. S. 382. No statute is cited to us, or has come to our attention, which expressly authorizes the Secretary of the Interior to grant a permit or right-of-way, in the nature of an easement for the construction, maintenance, or operation of electric power lines across lands allotted in severalty to individual Indians; neither can we find any justification for the exercise of the ever present inherent power of the Secretary of the Interior to protect the rights of the Indian ward.

The Act of March 11, 1904, 33 Stat. 65, 25 U. S. C. A. 321, expressly authorizes the Secretary of the Interior to grant a permit

or right-of-way in the nature of an easement across Indian lands and reservations, including lands allotted in severalty to any individual Indian but the Act relates exclusively to the construction of pipe lines for the conveyance of oil and gas, and like the Act of February 15, 1901, supra, it does not concern itself with electric power lines.

The Act of March 4, 1911 (36 Stat. 125, 43 U. S. C. A. 961. See, also, 16 U. S. C. A. 5) expressly authorizes the head of the department having jurisdiction over public lands, national forests and reservations of the United States to grant an easement for a right-of-way over the said lands, enumerated, for the construction of electric poles and lines for the transmission and distribution of electric power and other purposes but, like the Act of February 15, 1901, supra, the provisions of this Act are not extended, and do not include lands allotted in severalty to individual Indians.

A consideration of all these statutes, together and apart, and the attendant circumstances which prompted their enactment leads us to the conclusion that the interest of the Secretary of the Interior in a right-of-way opened and established by the state, across Indian lands allotted in severalty, in accordance with the laws of the state, is confined to the protection of the Indian ward against the alienation of any part of his land without the payment of just compensation therefor, and to safeguard his substantial rights under the applicable law. Here, the state of Oklahoma has opened and established a highway across certain Indian land allotted in severalty to an individual Indian in accordance with the law of the state in pursuance of a permit from the Secretary of the Interior which the Secretary of the Interior was authorized to grant for that purpose, for which the state of Oklahoma paid the Secretary of the Interior the sum of $1,275.00 for the benefit of the restricted Indians. The allotted land, as well as other adjacent land, is the beneficiary of the rural electric line established upon the right-of-way.

The state elected to open and establish a highway in accordance with its laws, by virtue of a permit granted for that purpose, and we can divine no congressional purpose to restrict the grant of the right-of-way beyond the requirements of the state law, in accordance with which the highway was opened and established.

It follows that the Secretary of the Interior has no express or implied authority to require the appellee to obtain a permit for the construction and maintenance of its rural electric lines along, and upon the right-of-way granted to the state for the primary purpose of opening and establishing a highway in accordance with its laws.

The judgment is affirmed.

Judgment

First Day, March Term, Monday, March 23rd, A. D. 1942

Before Honorable Orie L. Phillips, Honorable Sam G. Bratton, and Honorable Alfred P. Murrah, Circuit Judges

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Oklahoma and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

On April 28, 1942, the mandate of the United States Circuit Court of Appeals, in accordance with the opinion and judgment of said court, was issued to the United States District Court.

Clerk's certificate

United States Circuit Court of Appeals, *Tenth Circuit.*

I, Robert B. Cartwright, Clerk of the United States Circuit Court of Appeals for the Tenth Circuit, do hereby certify that the foregoing contains a full, true, and complete copy of the transcript of the record from the District Court of the United States for the Western District of Oklahoma, and full, true, and complete copies of certain pleadings, record entries, and proceedings, including the opinion (except full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States) had and filed in the United States Circuit Court of Appeals for the Tenth Circuit in a certain cause in said United States Circuit Court of Appeals, No. 2390, wherein United States of America was appellant, and Oklahoma Gas & Electric Company, a corporation, was appellee, as full, true, and complete as the originals of the same remain on file and of record in my office.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Tenth Circuit, at my office in Denver, Colorado, this 27th day of May A. D. 1942.

[seal] Robert B. Cartwright,
Clerk of the United States Circuit Court of Appeals,
Tenth Circuit.

By George A. Pease,
Deputy Clerk.

U. S. GOVERNMENT PRINTING OFFICE: 1942

40 Supreme Court of the United States

Order allowing certiorari

Filed October 12, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] File No. 46665. U. S. Circuit Court of Appeals, Tenth Circuit. Term No. 171. The United States of America, Petitioner vs. Oklahoma Gas & Electric Company. Petition for a writ of certiorari and exhibit thereto. Filed June 23, 1942. Term No. 171 O. T. 1942.

O. S. GOVERNMENT PRINTING OFFICE 1942

FILE COPY

No. 171

In the Supreme Court of the United States

OCTOBER TERM, 1942

UNITED STATES OF AMERICA, PETITIONER

v.

OKLAHOMA GAS & ELECTRIC COMPANY,
A CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

OKLAHOMA GAS & ELECTRIC COMPANY, A CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Tenth Circuit, entered in the above cause on March 23, 1942, affirming a judgment of the United States District Court for the Western District of Oklahoma.

OPINIONS BELOW

The opinion of the District Court (R. 19–28) is reported in 37 F. Supp. 347. The opinion of the Circuit Court of Appeals (R. 33–40) is reported in 127 F. (2d) 349.

JURISDICTION

The judgment of the Circuit Court of Appeals sought to be reviewed was entered March 23, 1942

(R. 41). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Acts of February 15, 1901, 31 Stat. 790, 43 U. S. C. § 959, and March 4, 1911, 36 Stat. 1253, 43 U. S. C. § 961, permitting private interests to acquire rights-of-way for telephone, telegraph, and power purposes "within or through any * * * Indian or any other reservation only upon approval of the chief officer of the department under whose supervision or control such reservation falls and upon a finding by him that the same is not incompatible with the public interest" are applicable to trust allotments within an Indian reservation.

2. Whether the United States may compel a power company, which has not applied for nor obtained a license or easement under the foregoing statutes, to remove its transmission lines and poles from those portions of a public highway which the State of Oklahoma constructed across an Indian trust allotment pursuant to Section 4 of the Act of March 3, 1901, 31 Stat. 1084, 25 U. S. C. § 311.

STATUTES INVOLVED

The Act of February 15, 1901, c. 372, 31 Stat. 790, 43 U. S. C. § 959; Sections 3 and 4 of the Act of March 3, 1901, c. 832, 31 Stat. 1058, 1083–1084, 25 U. S. C. §§ 319, 357, and 311; the Act of March 4,

1911, c. 238, 36 Stat. 1253, 43 U. S. C. § 961; and pertinent sections of other statutes granting special rights-of-way across Indian lands, are printed in chronological order in the Appendix, *infra*, pp. 11–17.

STATEMENT

On July 9, 1926, the State of Oklahoma, through its highway commission, requested the Secretary of the Interior of the United States "to grant permission in accordance with section 4 of the act of March 3, 1901 (31 Stats. L., 1058, 1084), to open and establish a public highway," eighty feet in width, across certain lands within the Kickapoo Indian Reservation, including trust allotment 193 which was patented in 1894 to She-pah-tho-quah, a Mexican Kickapoo, and which is still held in trust by the United States for her heirs (R. 13, 15, 28).[1] On January 20, 1928, damages in the sum of $1,275.00 having been paid to the United States for the heirs of She-pah-tho-quah, the Assistant Secretary of the Interior approved the map of definite location which accompanied the state's highway application (R. 15, 28).

On October 9, 1936, the State Highway Commission of Oklahoma granted to the Oklahoma Gas &

[1] The Kickapoo Indian Reservation in Oklahoma was established in 1883 by executive order. 1 Kappler, Indian Laws and Treaties (2d ed.) 844. The tribe and the United States subsequently agreed that the lands within the reservation should be allotted in severalty. Act of March 3, 1893, c. 203, 27 Stat. 557. See *United States* v. *Reily*, 290 U. S. 33, 36.

Electric Company, an interstate public utility, a license "to erect, construct and maintain a 4,000-volt electric line along, upon or across" certain highways in Oklahoma, including the segment of highway which crosses the allotment in question, "for the purpose of transmitting, selling and using electricity" (R. 16, 17, 28). The license states that it is revocable at will and that it "is granted subject to any and all claims made by adjacent property owners as compensation for additional burden on such adjacent and abutting property" (R. 18, 28).

Pursuant to this license from the State Highway Commission, and without requesting a permit or easement of any kind from the Secretary of the Interior, the Oklahoma Gas & Electric Company proceeded to erect, and has since maintained, eight poles along that portion of the highway which diagonally traverses allotment 193 (R. 11, 16, 28). The Company having repeatedly refused to apply to the Secretary of the Interior for a permit under the Act of February 15, 1901, c. 372, 31 Stat. 790, 43 U. S. C. § 959, or for an easement under the Act of March 4, 1911, c. 238, 36 Stat. 1253, 43 U. S. C. § 961,[1] the Secretary of the Interior requested the

[1] There are at present on the statute books two parallel types of right-of-way statutes. Type 1 empowers the Secretary of the Interior "to permit the use" of public lands and reservations for telephone, telegraph, power, pipe line, canal and other rights-of-way. Act of February 15, 1901, 31 Stat. 790, 43 U. S. C. § 959; cf. Act of March 3, 1901, § 4, 31 Stat. 1084, 25 U. S. C. § 311. Type 2 authorizes the

Attorney General to institute appropriate legal proceedings to compel compliance.

This suit was accordingly brought on June 18, 1940, for the purpose of obtaining an authoritative interpretation of these several right-of-way statutes. In its complaint the Government sought a declaratory adjudication that respondent's power line across allotment 193, erected without prior compliance with the federal statutes relating to the construction of power lines across Indian lands, constituted a use of federally owned property not included in the highway permit acquired by the

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Secretary "to grant an easement" for like purposes. Act of March 3, 1901, § 3, 31 Stat. 1083, 25 U. S. C. § 319; Act of March 11, 1904, 33 Stat. 65, 25 U. S. C. § 321; Act of March 4, 1911, 36 Stat. 1253, 43 U. S. C. § 961. Under type 1 the applicant obtains a revocable permit. *Swendig* v. *Washington Co.*, 265 U. S. 322 (1924); *United States* v. *Colorado Power Co.*, 240 Fed. 217 (Colo. 1916). Under type 2 the grantee acquires an actual interest in land, an easement of definite duration. 30 Op. A. G. 387 (1915).

Although the Acts of February 15, 1901, and March 4, 1911, both provide for power rights-of-way, neither supersedes the other. Under the earlier Act a power company obtains a *permit* revocable by the Secretary at any time; under the later Act it acquires a 50-year *easement* revocable only for nonuse or abandonment. See 40 L. E. 30 (1911); 41 L. D. 454, 455 (1913); 29 Op. A. G. 303, 311 (1912); H. Rept. No. 2177, 66th Cong., 3d sess. (1911) (Ser. No. 5848). A company may apply for a right-of-way under either Act.

The Acts of 1901 and 1911, insofar as they provide for power rights-of-way across Indian lands, were not repealed by the Federal Water Power Act of June 10, 1920, c. 285, 41 Stat. 1063, and continue to be administered by the Department of the Interior. 51 L. D. 41, 42 (1925).

State of Oklahoma in 1928 (R. 2-6). The Government asked that the poles and lines be removed and that damages computed at $5.00 for each of the eight poles be assessed against the defendant (R. 6).

In its answer respondent asserted that the State of Oklahoma acquired a highway "easement" across the allotment in question in 1928, and contended that the United States no longer had any jurisdiction, authority or control over the said "easement" (R. 6-9).

The District Court denied the relief sought, holding that the nature and incidents of the highway grant or easement acquired by the State across the allotment in question pursuant to the Act of March 3, 1901, are to be determined by the laws of Oklahoma, and that the maintenance of electric transmission lines on public highways in that state does not constitute an additional servitude for which the owners of abutting property are entitled to compensation (R. 19-28). The Circuit Court of Appeals affirmed, but on entirely different grounds. It held that the interpretation and construction of the 1901 Act is a federal question to be determined without reference to "state notions of its meaning and purpose" (R. 35). But, after examining numerous right-of-way statutes, it concluded that an Indian trust allotment is not a "reservation" within the meaning of the special acts of February 15, 1901, and March 4, 1911, dealing with electric transmission lines, that these special statutes are there-

fore inapplicable, that the grant of permission to establish a "public highway" under the Act of March 3, 1901, was broad enough to sanction the use thereof for power lines, and that respondent could not be required to comply with the conditions prescribed by Congress in the special acts governing the granting of rights-of-way for power purposes (R. 35–40).

SPECIFICATION OF ERRORS TO BE URGED

1. The Circuit Court of Appeals erred in holding that a trust allotment is not a "reservation" within the meaning of the Acts of Congress permitting private interests to acquire rights-of-way for telephone, telegraph, power, and other purposes "within or through any • • • Indian, or any other reservation only upon approval of the chief officer of the department under whose supervision or control such reservation falls and upon a finding by him that the same is not incompatible with the public interest."

2. The Circuit Court of Appeals erred in holding that a state which has been permitted to establish a public highway across Indian trust allotments under Section 4 of the Act of March 3, 1901, may in turn permit a power company to maintain its transmission lines and poles along those portions of the highway in contravention of express conditions imposed by Congress in special statutes governing the acquisition of rights-of-way for power purposes across Indian reservations.

REASONS FOR GRANTING THE WRIT

1. In holding that a trust allotment is not a "reservation" within the meaning of Acts of February 15, 1901, and March 4, 1911, the court below ignored a contrary administrative interpretation consistently followed for 35 years. Ever since 1907, the Department of the Interior has ruled that the phrase "Indian, or * * * other reservation," as used in the various right-of-way statutes, includes individual trust allotments within an Indian reservation. *Fresnol Water-Right Canal,* 35 L. D. 550, 551 (1907); *Instructions—Applications for Power Permits within Indian Reservations,* 42 L. D. 419, 420 (1913); *West Okanogan Valley Irrigation District,* 45 L. D. 563, 565–567 (1916). And this Court, in construing comparable language making it a federal offense for an Indian to commit certain crimes "within the limits of any Indian reservation," has likewise held that trust allotments are reservations. *United States* v. *Celestine,* 215 U. S. 278, 284–286.

2. Since trust allotment 193 is a "reservation" within the meaning of the Acts of February 15, 1901, and March 4, 1911, providing for power rights-of-way "within or through any * * * Indian, or any other reservation only upon the approval of the chief officer of the department under whose supervision or control such reservation falls and upon a finding by him that the same is not incompatible with the public interest," the condi-

tions imposed in those Acts should have been given effect. These particular statutes deal specifically with rights-of-way for power purposes; they therefore supersede contemporaneous and prior right-of-way statutes of a more general character. *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 405–406, affirming 209 Fed. 554, 560–561 (C. C. A. 8). In that case this Court and the Circuit Court of Appeals both agreed that an 1896 Act dealing specifically with power sites and rights-of-way superseded *pro tanto* a more general statute enacted in 1866.

The mere fact that in 1928 the Secretary of the Interior granted "permission" to the State of Oklahoma to establish a "public highway" eighty feet in width across a trust allotment does not mean that the state may in turn license the use of that highway for telephone, telegraph, power, pipe line, canal, railway, and other purposes covered by specific federal statutes. The fee title to that strip of land is still in the United States and that strip is still a "reservation" as that word is used in the general land laws. *United States* v. *Soldana*, 246 U. S. 530; *Ex parte Konaha*, 43 F. Supp. 747 (E. D. Wis.); *United States* v. *Celestine*, 215 U. S. 278, 285.

If the decision below is allowed to stand, it will mean that a mere grant of an easement for highway purposes under Section 4 of the Act of March 3, 1901, will carry with it the right to construct

pipe lines, telegraph and telephone lines, power lines, etc., and that private companies will be able to operate within and across Indian lands without first complying with the specific conditions prescribed by Congress for each of these particular types of rights-of-way. In short, the specific requirements laid down by Congress that power lines shall be constructed across Indian reservations only with the consent of the Secretary of the Interior and upon a finding by him that "the same is not incompatible with the public interest" will be nullified in those cases where the state authorities decide to permit such structures to be placed on public highways previously constructed across such reservations.

3. The questions thus raised are of great importance to the proper administration by the Department of the Interior of the numerous right-of-way statutes. Indian reservations, partially allotted in severalty under trust patents effective until 1956, exist in 22 public land states. Approximately 3,000 miles of state highways have heretofore been constructed across these reservations, and some 400 miles of telephone, telegraph, power and pipe lines have been placed along these highways by public utilities which, pending the outcome of the present case, have refused to comply with the conditions imposed by Congress in the special right-of-way statutes. Furthermore, if the decision is allowed to stand—that a trust allotment is not a "reserva-

tion" within the meaning of the 1901 and 1911 Acts—it will follow that there is no administrative procedure by which the construction of power lines across trust allotments outside of highway rights-of-way may be authorized.

CONCLUSION

It is respectfully submitted that for the reasons stated this petition for a writ of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

JUNE 1942.

APPENDIX

Act of February 15, 1901, c. 372, 31 Stat. 790, 43 U. S. C. § 959:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of right of way through the public lands, forest and other reservations of the United States, and the Yosemite, Sequoia, and General Grant national parks, California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe lines, electrical, telegraph, and telephone lines and poles, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted.

hereunder or any one or more of the purposes herein named: *Provided,* That such permits shall be allowed within or through any of said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the Department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest: *Provided further,* That all permits given hereunder for telegraph and telephone purposes shall be subject to the provision of title sixty-five of the Revised Statutes of the United States, and amendments thereto, regulating rights of way for telegraph companies over the public domain: *And provided further,* That any permission given by the Secretary of the Interior under the provisions of this Act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park.

Sections 3 and 4 of the Act of March 3, 1901, c. 832, 31 Stat. 1058, 1083–1084, 25 U. S. C. §§ 319, 357, 311:

SEC. 3. That the Secretary of the Interior is hereby authorized and empowered to grant a right of way, in the nature of an easement, for the construction, operation, and maintenance of telephone and telegraph lines and offices for general telephone and telegraph business through any Indian reservation, through any lands held by an Indian tribe or nation in the Indian Territory, through any lands reserved for an Indian agency or Indian school, or for other purpose in connection with the Indian service, or through any lands which have been allotted in sev-

eralty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation, upon the terms and conditions herein expressed. No such lines shall be constructed across Indian lands, as above mentioned, until authority therefor has first been obtained from the Secretary of the Interior, and the maps of definite location of the lines shall be subject to his approval. The compensation to be paid the tribes in their tribal capacity and the individual allottees for such right of way through their lands shall be determined in such manner as the Secretary of the Interior may direct, and shall be subject to his final approval; and where such lines are not subject to State or Territorial taxation the company or owner of the line shall pay to the Secretary of the Interior, for the use and benefit of the Indians, such annual tax as he may designate, not exceeding five dollars for each ten miles of line so constructed and maintained; and all such lines shall be constructed and maintained under such rules and regulations as said Secretary may prescribe. But nothing herein contained shall be so construed as to exempt the owners of such lines from the payment of any tax that may be lawfully assessed against them by either State, Territorial, or municipal authority; and Congress hereby expressly reserves the right to regulate the tolls or charges for the transmission of messages over any lines constructed under the provisions of this Act: *Provided,* That incorporated cities and towns into or through which such telephone or telegraphic lines may be constructed shall have the power to regulate the manner of construction therein, and nothing herein contained shall be so con-

strued as to deny the right of municipal taxation in such towns and cities.

That lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

SEC. 4. That the Secretary of the Interior is hereby authorized to grant permission, upon compliance with such requirements as he may deem necessary, to the proper State or local authorities for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated, through any Indian reservation or through any lands which have been allotted in severalty to any individual Indians under any laws or treaties but which have not been conveyed to the allottees with full power of alienation.

Act of March 11, 1904, c. 505, 33 Stat. 65, 25 U. S. C. § 321:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior is hereby authorized and empowered to grant a right of way in the nature of an easement for the construction, operation, and maintenance of pipe lines for the conveyance of oil and gas through any Indian reservation, through any lands held by an Indian tribe or nation in the Indian Territory, through any lands reserved for an Indian agency or Indian school, or for other purpose in connection with the Indian service, or through any lands which have been allotted in severalty to any

individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation, upon the terms and conditions herein expressed. No such lines shall be constructed across Indian lands, as above mentioned, until authority therefor has first been obtained from, and the maps of definite location of said lines approved by, the Secretary of the Interior: *Provided,* That the construction of lateral lines from the main pipe line establishing connection with oil and gas wells on the individual allotments of citizens may be constructed without securing authority from the Secretary of the Interior and without filing maps of definite location, when the consent of the allottee upon whose lands oil or gas wells may be located and of all other allottees through whose lands said lateral pipe lines may pass has been obtained by the pipe line company: *Provided further,* That in case it is desired to run a pipe line under the line of any railroad, and satisfactory arrangements cannot be made with the railroad company, then the question shall be referred to the Secretary of the Interior, who shall prescribe the terms and conditions under which the pipe line company shall be permitted to lay its lines under said railroad. The compensation to be paid the tribes in their tribal capacity and the individual allottees for such right of way through their lands shall be determined in such manner as the Secretary of the Interior may direct, and shall be subject to his final approval. And where such lines are not subject to State or Territorial taxation the company or owner of the line shall pay to the Secretary of the Interior, for the use and benefit of the Indians, such annual tax as he may designate, not exceeding five

dollars for each ten miles of line so constructed and maintained under such rules and regulations as said Secretary may prescribe. But nothing herein contained shall be so construed as to exempt the owners of such lines from the payment of any tax that may be lawfully assessed against them by either State, Territorial, or municipal authority. And incorporated cities and towns into and through which such pipe lines may be constructed shall have the power to regulate the manner of construction therein, and nothing herein contained shall be so construed as to deny the right of municipal taxation in such towns and cities, and nothing herein shall authorize the use of such right of way except for pipe line, and then only so far as may be necessary for its construction, maintenance, and care: *Provided,* That the rights herein granted shall not extend beyond a period of twenty years: *Provided further,* That the Secretary of the Interior, at the expiration of said twenty years, may extend the right to maintain any pipe line constructed under this Act for another period not to exceed twenty years from the expiration of the first right, upon such terms and conditions as he may deem proper.

SEC. 2. The right to alter, amend, or repeal this Act is expressly reserved."

Act of March 4, 1911, c. 238, 36 Stat. 1235, 1253, 43 U. S. C. § 961:

* * * * *

That the head of the department having jurisdiction over the lands be, and he hereby is, authorized and empowered, under general regulations to be fixed by him, to grant an easement for rights of way, for a period not exceeding fifty years from the date of the

issuance of such grant, over, across, and upon the public lands, national forests, and reservations of the United States for electrical poles and lines for the transmission and distribution of electrical power, and for poles and lines for telephone and telegraph purposes, to the extent of twenty feet on each side of the center line of such electrical, telephone and telegraph lines and poles, to any citizen, association, or corporation of the United States, where it is intended by such to exercise the right of way herein granted for any one or more of the purposes herein named: *Provided,* That such right of way shall be allowed within or through any national park, national forest, military, Indian, or any other reservation only upon the approval of the chief officer of the department under whose supervision or control such reservation falls, and upon a finding by him that the same is not incompatible with the public interest: *Provided,* That all or any part of such right of way may be forfeited and annulled by declaration of the head of the department having jurisdiction over the lands for nonuse for a period of two years or for abandonment.

That any citizen, association, or corporation of the United States to whom there has heretofore been issued a permit for any of the purposes specified herein under any existing law, may obtain the benefit of this Act upon the same terms and conditions as shall be required of citizens, associations, or corporations hereafter making application under the provisions of this statute.

U. S. GOVERNMENT PRINTING OFFICE: 1942

FILE COPY

No. 171

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OPINIONS BELOW

The opinion of the district court (R. 13–20) is reported in 37 F. Supp. 347. The opinion of the circuit court of appeals (R. 25–32) is reported in 127 F. (2d) 349.

JURISDICTION

The judgment of the circuit court of appeals was entered March 23, 1942 (R. 33). The petition for writ of certiorari was filed June 23, 1942, and was granted October 12, 1942. The jurisdic-

tion of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Acts of February 15, 1901, and March 4, 1911, permitting private interests to acquire rights-of-way for telephone, telegraph and power purposes "within or through any * * * Indian, or other reservation" only upon certain conditions are applicable to individual trust allotments within an Indian reservation, so that a power company whose lines traverse a trust allotment is required to comply with the conditions of those statutes.

2. Whether the grant of "permission" to a state under Section 4 of the Act of March 3, 1901, to open and establish a public highway across Indian lands renders inapplicable to persons seeking power line rights-of-way over the highway the requirements of specific legislation regulating the grant of rights-of-way over Indian lands for purposes of maintaining power lines.

STATUTES INVOLVED

The Act of February 15, 1901, c. 372, 31 Stat. 790, 43 U. S. C. sec. 959; Sections 3 or 4 of the Act of March 3, 1901, c. 832, 31 Stat. 1058, 1083–1084, 25 U. S. C. sees. 319, 357, and 311; the Act of March 4, 1911, c. 238, 36 Stat. 1235, 1253,

43 U. S. C. sec. 961; and pertinent sections of other statutes granting special rights-of-way across Indian lands, are printed in chronological order in the Appendix, *infra*, pp. 30–37.

STATEMENT

This is a suit by the United States for declaratory and injunctive relief against a power company which has placed electric transmission lines and poles along a highway across an Indian trust allotment without having first obtained the consent of the Secretary of the Interior. The facts are stipulated and not in dispute:

In 1883 the President by executive order established a reservation in Oklahoma (then the Indian Territory) for the Kickapoo Indians.[1] The tribe and the United States subsequently agreed that the lands within the reservation should be allotted in severalty.[2] A trust patent to allotment 193 (to which this suit relates) was issued on October 6, 1894, to She-pah-tho-quah, a Mexican Kickapoo (R. 9, 21). Although the original allottee has since died, the land is still held in trust by the United States for her heirs (R. 9, 21).

On July 9, 1926, the State of Oklahoma, through its highway commission, requested the Secretary

[1] Kappler, Indian Laws and Treaties (2d ed.) 844; Annual Report of the Commissioner of Indian Affairs, 1883, p. 223.

[2] Act of March 3, 1893, c. 203, 27 Stat. 557. See *United States* v. *Reily*, 200 U. S. 33, 36.

of the Interior of the United States "to grant permission in accordance with section 4 of the act of March 3, 1901 (31 Stats. L., 1058, 1084), to open and establish a public highway", eighty feet in width, across certain lands within the Kickapoo Indian Reservation, including trust allotment 193 (R. 10, 21). On January 20, 1928, damages in the sum of $1,275.00 having been paid to the United States for the heirs of She-pah-tho-quah, the Assistant Secretary of the Interior approved the map of definite location which accompanied the state's highway application (R. 11, 21).

On October 9, 1936, the State Highway Commission of Oklahoma granted to the Oklahoma Gas & Electric Company, an interstate public utility, a license "to erect, construct and maintain a 4,000 volt electric line along, upon or across" certain highways in Oklahoma, including the segment of highway which crosses the allotment in question, "for the purpose of transmitting, selling, and using electricity" (R. 11, 12, 21). The license states that it is revocable at will and that it "is granted subject to any and all claims made by adjacent property owners as compensation for additional burden on such adjacent and abutting property" (R. 13, 21).

Pursuant to this license from the State Highway Commission, and without requesting a permit or easement of any kind from the Secretary of the Interior, the Oklahoma Gas & Electric Company

proceeded to erect, and has since maintained, eight poles along that portion of the highway which diagonally traverses allotment 193 (R. 8, 11, 21). The Company having repeatedly refused to apply to the Secretary of the Interior for a permit under the Act of February 15, 1901, c. 372, 31 Stat. 790, 43 U. S. C. sec. 959, or for an easement under the Act of March 4, 1911, c. 238, 36 Stat. 1253, 43 U. S. C. sec. 961, the Secretary of the Interior requested the Attorney General to institute appropriate legal proceedings to compel compliance.

This suit was accordingly brought on June 18, 1940, for the purpose of obtaining an authoritative interpretation of these several right-of-way statutes. In its complaint the Government sought a declaratory adjudication that respondent's power line across allotment 193, erected without prior compliance with the federal statutes relating to the construction of power lines across Indian lands, constituted a use of federally owned property not included in the highway permit acquired by the State of Oklahoma in 1928 (R. 2–5). The Government asked that the poles and lines be removed and that damages computed at $5.00 for each of the eight poles be assessed against the defendant (R. 5).

In its answer respondent asserted that the State of Oklahoma acquired a highway "easement" across the allotment in question in 1928, and contended that the United States no longer had any

jurisdiction, authority or control over the said "easement" (R. 5–7).

The district court denied the relief sought, holding that the nature and incidents of the highway grant or easement acquired by the State across the allotment in question pursuant to the Act of March 3, 1901, are to be determined by the laws of Oklahoma, and that the maintenance of electric transmission lines on public highways in that state does not constitute an additional servitude for which the owners of abutting property are entitled to compensation (R. 13–20). The circuit court of appeals affirmed, but on entirely different grounds. It held that the interpretation and construction of the 1901 Act is a federal question to be determined without reference to "state notions of its meaning and purpose" (R. 27). But, after examining numerous right-of-way statutes, it concluded that an Indian trust allotment is not a "reservation" within the meaning of the special acts of February 15, 1901 and March 4, 1911, dealing with electric transmission lines, that these special statutes are therefore inapplicable, that the grant of permission to establish a "public highway" under the Act of March 3, 1901, was under the circumstances, therefore, broad enough to sanction the use thereof for power lines, and that respondent could not be required to comply with the conditions prescribed by Congress in the special Acts governing the granting of rights-of-way for power purposes (R. 27–32).

SPECIFICATION OF ERRORS

1. The circuit court of appeals erred in holding that a trust allotment is not a "reservation" within the meaning of the acts of Congress permitting private interests to acquire rights-of-way for telephone, telegraph, power, and other purposes "within or through any • • • Indian, or other reservation only upon approval of the chief officer of the department under whose supervision or control such reservation falls and upon a finding by him that the same is not incompatible with the public interest".

2. The Circuit Court of Appeals erred in holding that a state which has been permitted to establish a public highway across Indian trust allotments under Section 4 of the Act of March 3, 1901, may in turn permit a power company to maintain its transmission lines and poles along those portions of the highway in contravention of express conditions imposed by Congress in special statutes governing the acquisition of rights-of-way for power purposes across Indian reservations.

SUMMARY OF ARGUMENT

I

The court below, in holding that a trust allotment is not a "reservation" within the meaning of the Acts of February 15, 1901, and March 4, 1911, failed properly to consider statutes *in pari*

materia and ignored a contrary administrative interpretation consistently followed for thirty-five years. Ever since 1907 the Department of the Interior has ruled that the phrase "Indian, or other reservation" as used in the various right-of-way statutes includes individual trust allotments within an Indian reservation. *Fresnol Water-Right Canal*, 35 L. D. 550, 551 (1907); *Instructions—Applications for Power Permits Within Indian Reservations*, 42 L. D. 419, 420 (1913); *West Okanogan Valley Irrigation District*, 45 L. D. 563, 565–567 (1916); 51 L. D. 41, 42 (1925); see also 49 L. D. 396, 397–398 (1923) (dictum). And this Court, in construing comparable language making it a federal offense for an Indian to commit certain crimes "within the limits of any Indian reservation", has likewise held that trust allotments are reservations. *United States* v. *Celestine*, 215 U. S. 278, 284–286.

Since trust allotment 193 is a "reservation" within the meaning of the Acts of February 15, 1901, and March 4, 1911, providing for power rights-of-way "within or through any * * * Indian, or other reservation only upon the approval of the chief officer of the Department under whose supervision such * * * reservation falls and upon a finding by him that the same is not incompatible with the public interest", compliance with the conditions imposed in those Acts should have been required.

II

That a grant of permission to a state to open and establish public highways across Indian lands under Section 4 of the 1901 Act was not intended to confer upon the state authority to license the unused portions of such rights-of-way for pipe lines, telephone or telegraph lines, railroad, canal and other comparable uses is clearly shown by other right-of-way statutes *in pari materia,* and by long continued administrative practice:

The Act of March 3, 1901, providing for the opening and establishment of highways is but a fragment of the numerous acts of Congress which have granted rights-of-way across the public lands and reservations of the United States. The Acts of February 15, 1901 and March 4, 1911, deal specifically with rights-of-way for power purposes. They expressly declare that a permit or easement for electric transmission lines or poles "shall be allowed within or through any military, Indian, or other reservation *only* upon the approval of the chief officer of the Department under whose supervision such * * * reservation falls and *upon a finding by him that the same is not incompatible with the public interest*". The nature of the interest which Congress authorized to be granted to a state under Section 4 of the Act of March 3, 1901, being clearly limited in scope (cf. *Swendig* v. *Washington Co.,* 265 U. S. 322; *United*

States v. *Colorado Power Co.*, 240 Fed. 317 (Colo. 1916); 30 L. D. 588 (1901)), must be determined in the light of these special statutes dealing with rights-of-way for power purposes. Hence, a mere grant to the state of "permission" to establish a "public highway" does not mean that the state may in turn license the use of that highway for telephone, telegraph, power and pipe lines, canal, railway and other purposes *covered by specific federal right-of-way statutes.* And such has been the construction placed on these various statutes by the Department of the Interior. That Department's construction of the land laws of the United States is entitled to great weight. *Cramer* v. *United States*, 261 U. S. 219, 227.

The nature of the interest which a state acquires by a grant under Section 4 of the Act of March 3, 1901, and the uses to which a right-of-way thus granted may be put are to be determined by federal law. *United States* v. *Oregon*, 295 U.S. 1, 27–28; *United States* v. *Holt Bank*, 270 U.S. 49, 55–56; *Brewer-Elliott Oil & Gas Co.* v. *United States*, 260 U.S. 77, 87.

ARGUMENT

Congress has, by a series of acts, comprehensively prescribed requirements which must be met by persons seeking rights-of-way through lands owned by the United States for various public

utility purposes. The basic Act in this series is that of February 15, 1901, which authorizes and empowers the Secretary of the Interior "to permit the use of rights of way through the public lands, forests and other reservations of the United States" for electrical power purposes, for telephone and telegraph purposes, for pipes and pipe lines, and for irrigation and mining purposes. The grantee of a permit under this Act does not acquire "any right, or easement, or interest in, to, or over any public land, reservation, or park"; he acquires only a permit, revocable at the discretion of the Secretary of the Interior. *Swendig* v. *Washington Co.*, 265 U.S. 322; *United States* v. *Colorado Power Co.*, 240 Fed. 217 (Colo. 1916); 30 L.D. 588 (1901) (Van Devanter).

Since many utilities hesitated to make large investments in reliance upon revocable permits, Congress proceeded to enact a series of statutes by which these companies could also acquire actual easements across Indian lands.[3] Section 3 of the Act of March 3, 1901, c. 832, 31 Stat. 1058, 1083, 25 U.S.C. sec. 319, empowered the Secretary of the Interior "to grant a right of way, in the nature of an easement, for the construction, operation, and maintenance of telephone and telegraph lines". The Act of March 11, 1904, c. 505, 33 Stat. 65 (25

[3] Cf. S. Rep. No. 967, 61st Cong., 3d Sess., p. 1 (1911) (Serial No. 5840).

U. S. C. sec. 321, authorized the Secretary to grant similar easements for pipeline purposes. And finally the Act of March 4, 1911, c. 238, 36 Stat. 1235, 1253, 43 U. S. C. sec. 961, empowered the Secretary to grant easements for electric transmission lines and poles. The pattern was thus complete: the last three acts provided for actual easements for most of the purposes for which permits could be granted under the Act of February 15, 1901. As a result of these parallel enactments, the various utilities have a choice of applying for a permit under the Act of February 15, 1901, or an easement under the later statutes. 30 L. D. 588 (1901) (opinion by Assistant Attorney General Van Devanter); 40 L. D. 30, 31 (1911). But whether the companies seek a permit or whether they apply for an easement they must comply with the conditions imposed by Congress in the particular statute under which their application is made.

With respect to power lines of the sort here involved, the Acts of February 15, 1901, and March 4, 1911, provide that the permits and easements to be issued thereunder "shall be allowed within or through any * * * military, Indian, or other reservation only upon the approval of the chief officer of the Department under whose supervision such * * * reservation falls and upon a finding by him that the same is not incompatible with the public interest". The ulti-

mate question in this case is whether the respondent must comply with the requirements of these two Acts by securing the approval of the Secretary of the Interior for the construction of its power lines across the land here in question.

Both the district court and the circuit court of appeals concluded that compliance with these statutes was unnecessary, but they differed in their reasoning. The district court reached its conclusion on the theory that by granting "permission" to the State of Oklahoma to open and establish a highway across the lands here involved under Section 4 of the Act of March 3, 1901, dealing with rights-of-way for state highways, the Secretary of the Interior had parted with both his power and his duty under other legislation to supervise the use of the land composing the highway for any rights-of-way for utility purposes. The rationale of the circuit court of appeals, which rejected the broad ground relied upon by the district court, was that neither of the foregoing Acts applied to rights-of-way over individual trust allotments; therefore the "permission" granted to the State of Oklahoma to open a public highway across the allotted land here in question, in the absence of any applicable legislation restricting the scope of the interest thus acquired, was held to constitute sufficient authority to permit the state to license the use of the highway for power line purposes.

I

The requirements of the Acts of February 15, 1901, and March 4, 1911, governing the grants of rights-of-way "within or through any * * * Indian, or other reservation" apply to rights-of-way over trust allotments within a reservation

The Act of February 15, 1901, provides:

> That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forest and other reservations of the United States * * * for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipe lines, [and various mining and irrigation purposes] * * * *Provided*, That such permits shall be allowed within or through * * * any forest, military, Indian, or other reservation only upon the approval of the chief officer of the Department under whose supervision such * * * reservation falls and upon a finding by him that the same is not incompatible with the public interest * * *.

The Act of March 4, 1911 provides substantially that where permits might have been granted for electric power and telephone and telegraph purposes under the Act of February 15, 1901, easements may also be granted.

The conclusion of the circuit court of appeals with respect to the inapplicability of these Acts to individual trust allotments within Indian reservations was based primarily on the fact that they did not explicitly include trust allotments in their coverage, whereas later legislation dealing with rights-of-way for telegraph and telephone purposes[4] and pipe-line purposes[5] did specifically cover trust allotments along with other Indian lands. But the inference that by failing explicitly to include allotments in the basic statute Congress intended to exclude them from its coverage applies equally to other specified types of Indian lands in the later statutes.[6] The obviously broad coverage of the Act of February 15, 1901, renders any such

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[4] A right-of-way, in the nature of an easement, (as distinguished from the permit granted by the Act of February 15, 1901) may be granted "through any Indian reservation, through any lands held by an Indian tribe or nation in the Indian Territory, through any lands reserved for an Indian agency or Indian school, or for other purpose in connection with the Indian service, or through any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation * * *." Sec. 3, Act of March 3, 1901, c. 832, 31 Stat. 1058, 1083–1084, 25 U. S. C. sec. 319.

[5] The above language of Section 3 of the Act of March 3, 1901, is incorporated expressly in the Act of March 11, 1904, c. 505, 33 Stat. 65, 25 U. S. C. sec. 21.

[6] E. g., any lands reserved for an Indian agency or Indian school, or for other purpose in connection with the Indian service.

inference as to congressional intent doubtful.' On the other hand, that Congress did not intend to treat rights-of-way over trust allotments any differently from rights-of-way over other Indian lands is suggested by the statute first providing comprehensively for allotments—the General Allotment Act of 1887. That Act contained a section providing that nothing therein should "be so construed as to affect the right and power of Congress to grant the right of way through any lands granted to an Indian or a tribe of Indians * * *" (c. 119, 24 Stat. 391, 25 U. S. C. sec. 341).[4]

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[3] Moreover, the nice point which the court below thus makes of the differences in the statutory language presupposes an identity of origin for the legislation which is here lacking. The two later Acts in which trust allotments are specifically mentioned dealt with Indian lands exclusively, and were the products of House and Senate Committees on Indian Affairs [for the Act of March 3, 1901, see 56th Congress, 2d Session, H. R. 12904; H. Rept. No. 2064; S. Rep. No. 1979. For the Act of March 11, 1904 see 58th Congress, 2d Session, H. R. 9636, S. 3317, H. Rep. No. 906; 38 Cong. Rec. 612, 684, 1302, 1403 and 1902], whereas the Act of February 15, 1901, dealt with public lands generally and was reported out by the House Committee on Public Lands [See 34 Cong. Rec. 1157].

[4] Congress has from time to time treated allotted lands differently from other lands on Indian reservations. But in such cases it was not left to inference that the allotted lands were being singled out for special treatment. One of the very Acts upon which the circuit court of appeals relied—the Act of March 3, 1901, Section 3—affords such an instance. There, by a separate paragraph, Congress authorized condemnation of allotted lands, and only of allotted lands.

A consideration of the consequences of the construction adopted by the circuit court of appeals makes it even more doubtful that Congress intended to exclude trust allotments from the coverage of the Acts of February 15, 1901, and March 4, 1911. Thus, although the allottee is protected when easements over allotted lands are sought for telephone, telegraph, or pipe-line purposes (since the statutes providing for such easements specifically allude to allotments) the interpretation adopted by the circuit court of appeals would deprive allottees of such protection when easements for power lines are sought. This result contrasts sharply with the comprehensive coverage of the legislation with respect to easements over other types of Indian lands for all utility purposes. It is also doubtful whether, as the decision below necessarily implies, Congress intended to forbid the issuance of *permits* across Indian trust allotments for telegraph, telephone and pipe-line purposes, at the same time that it provided for the grant of *easements* for identical purposes. Nor is there any evidence either in the language of the legislation or otherwise that Congress intended to deprive the Secretary of the Interior of his authority to grant either permits or easements for power lines across trust allotments outside of highways. Yet that too is a necessary implication of the decision below. Certainly, a more explicit indication of congressional intention than the fail-

ure, in a statute of such broad coverage, to allude specifically to allotments is required before a construction which produces gaps in the congressional scheme for regulating rights-of-way over Indian lands can be adopted.

Conformity to the pattern of related legislation is not the only guide-post to the meaning of the term "reservation" in the Acts of February 15, 1901 and March 4, 1911. Under well-established administrative construction the result thus pointed to is also required. It was early indicated, in an opinion prepared by Assistant Attorney General Van Devanter, that any land set aside or "reserved" by the United States for special purposes is a "reservation" as that word is used in the statutes providing for rights-of-way "within or through any * * * Indian, or other reservation". Cf. *Rio Verde Canal Co.*, 27 L. D. 421, 422 (1898). Ever since 1907 the Department of the Interior has ruled that the phrase "Indian, or other reservation", as used in the various right-of-way statutes, includes individual trust allotments within an Indian reservation. *Fresnol Water-Right Canal*, 35 L. D. 550, 551 (1907); *Instructions—Applications for Power Permits Within Indian Reservations*, 42 L. D. 419, 420 (1913); *West Okanogan Valley Irrigation District*, 45 L. D. 563, 565–567 (1916); 51 L. D. 41, 42 (1925). See also 49 L. D. 396, 397–398 (1923) (*dictum*). As a general matter, the long-continued construction of a statute by those charged with its

administration "is entitled to great weight, and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous." *United States* v. *Johnston,* 124 U. S. 236, 253; *United States* v. *Moore,* 95 U. S. 760, 763; *Brewster* v. *Gage,* 280 U. S. 327, 336. And with respect to land grants this Court has given particular weight to rulings of the Department of the Interior. *Cramer v. United States,* 261 U. S. 219, 227. In view of its appropriateness against the background of related right-of-way legislation there is no reason for upsetting this well-established administrative interpretation.

The conclusion thus reached from an examination of the legislation, and its administrative construction, has also been suggested by this Court in construing indistinguishable legislation. *United States* v. *Celestine,* 215 U. S. 278, held expressly that the term "reservation" in an act making it a federal offense for an Indian to commit certain crimes "within the limits of any Indian reservation" included trust allotments.

Since trust allotment 193 is a "reservation" within the meaning of the Acts of February 15, 1901, and March 4, 1911, providing for power rights-of-way "within or through any * * * Indian, or other reservation only upon the approval of the chief officer of the Department under whose supervision such * * * reserva-

tion falls and upon a finding by him that the same is not incompatible with the public interest", compliance with the conditions imposed in those Acts should have been required.*

II

The grant of "permission" to a State to open and establish a public highway under the Act of March 3, 1901, does not absolve applicants for rights-of-way for public utility purposes from the necessity of complying with right-of-way legislation otherwise applicable to them

It would follow from respondent's failure to comply with the requirements of the Act of February 15, 1901, and March 4, 1911, that the decision of the circuit court of appeals must be reversed, unless the "permission" obtained by the State of Oklahoma under Section 4 of the Act of March 3, 1901, to open a public highway across the lands here in question authorized the State to toll the requirements of those two Acts. It was this broad reasoning on which the district court relied in concluding that respondent was absolved from the necessity of complying with those statutes.

Section 4 of the Act of March 3, 1901, c. 832, 31

* The Acts of 1901 and 1911, in so far as they provide for power rights-of-way across Indian allotments were not repealed by the Federal Water Power Act of June 10, 1920, c. 285, 41 Stat. 1063, and continue to be administered by the Department of the Interior. 51 L. D. 41, 42 (1925).

Stat. 1058, 1084, 25 U. S. C. sec. 311, reads as follows:

> the Secretary of the Interior is hereby authorized to grant permission, upon compliance with such requirements as he may deem necessary, to the proper State or local authorities for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated, through any Indian reservation or through any lands which have been allotted in severalty to any individual Indians under any laws or treaties but which have not been conveyed to the allottees with full power of alienation.

There is little question that Congress did not intend, in providing for "permission" to states to open and establish public highways across Indian lands, that this permission would, without more,[*] carry with it the authority to relieve utility companies of the requirements of other right-of-way legislation.

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[*] It is not necessary in this case to decide whether the Secretary of the Interior could, in granting "permission" under Section 4, by express language authorize a state to license its highway for power or telephone line purposes. The application of the State of Oklahoma requested the Secretary merely "to grant permission in accordance with section 4 * * * to open and establish a public highway", (R. 10) and the grant by the Secretary reads: "Approved subject to the provisions of the Act of March 3, 1901 (31 Stat. L., 1058–1084), Department regulations thereunder; and subject also to any prior valid existing right or adverse claim." (R. 11.)

At the outset it must be emphasized that "permission", rather than an "easement", is the interest which the Secretary is authorized to grant under Section 4. That grants of easements, which were regarded by Congress as more substantial interests than grants of "permission",[11] were authorized by other sections of the same Act[12] suggests that Congress intended the grants to the states under this section to be extremely limited. The limits on the state's powers over rights-of-way thus granted become clear when Section 4 is examined in the context of related right-of-way legislation.

As has been pointed out above (pp. 10–13), by the Act of February 15, 1901, permits for rights-of-way over all public lands (including Indian lands) for electric power, telephone, telegraph, pipe-line, irrigation and mining purposes were authorized. The grant of more substantial interests—easements—was later authorized for telephone and telegraph purposes[13] and pipe-line purposes[14] over Indian lands. And in 1911 the grant of easements over most of the lands covered by the Act of February 15, 1901, for limited utility

[11] Cf. S. Rep. No. 967, 61st Cong., 3d Sess., p. 1 (1911) (Ser. No. 5840).

[12] Section 3, Act of March 3, 1901, c. 832, 31 Stat. 1083, 25 U. S. C. sec. 319.

[13] Act of March 3, 1901, c. 832, 31 Stat. 1058, 1083, 25 U. S. C. sec. 319.

[14] Act of March 11, 1904, c. 505, 33 Stat. 65, 25 U. S. C. sec. 321.

purposes was also authorized. In this legislation Congress was clearly authorizing the national Government, rather than the states, to regulate the use by various utility enterprises of rights-of-way across Indian lands. Since the grant of "permission" to states for the opening and establishing of public highways was authorized as part of the scheme for federal regulation of rights-of-way over Indian lands, it is reasonable to conclude that it was not intended to conflict with the other portions of the scheme. The improbability of conflict is emphasized by the fact that Section 4 was itself part of an Act which, in other sections, provided for federal regulation of utility rights-of-way. In this light, the care with which Congress avoided granting to the states any interest in the right-of-way greater than "permission" to use it for a public highway points to the conclusion that the "permission" thus granted to a state to open and establish a public highway does not carry with it the power to authorize uses of the highway which would otherwise violate the related federal legislation addressed specifically to rights-of-way for various utility purposes.

The conclusion thus arrived at from an examination of related legislation has long been adopted by the agency charged with administering these various right-of-way statutes. The Department of the Interior has taken the position that permission to establish a "public highway" across

Indian lands does not carry with it the right to locate pipe lines, etc., along such highways. For example, the pipe line regulations of December 21, 1906,[18] after outlining the procedure for acquiring rights-of-way for pipe lines under the Act of March 11, 1904, expressly declare that "where such pipes or pipe lines are laid under any road or traveled highway the individual or company constructing them shall keep open to travel during construction at least one-half in width of such road or highway, and on completion of construction shall restore such highway to its original condition, refilling any excavation whenever, by settling or other causes, the necessity may arise." These regulations make it clear that pipe lines constructed along "public highways" traversing Indian lands are nonetheless subject to the requirements and conditions prescribed by the 1904 Act. There are no reasons why private companies using such highways for telephone, telegraph, power and other purposes covered by specific federal statutes should not also comply with the express conditions imposed by Congress.

That Congress, in enacting Section 4 did not intend a grant under it, without more, to derogate from the requirements of the Acts of February 15, 1901, and March 4, 1911, thus seems evident.

There remains to be considered only the theory of the district court that the law of Oklahoma,

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[18] Current regulations to the same effect are to be found in 25 Code of Federal Regulations, sec. 256.33.

rather than the federal law, determines the scope of the State's power to license the use of the right-of-way which had been granted to the State under Section 4. In holding that state law rather than congressional intent and purpose furnished the appropriate yardstick for measuring the character of the interest thus granted to the State, the district court relied partly upon the Act of March 3, 1901, but more particularly upon the doctrine enunciated in *Barney* v. *Keokuk*, 94 U. S. 324. The circuit court of appeals correctly rejected this reasoning (R. 27).

The rationale of *Barney* v. *Keokuk* is not in point here. That case established the principle that title to lands underlying navigable waters having passed to the states upon their admission into the Union, the states may in turn relinquish their rights in these submerged lands to the riparian patentees of the Federal Government. Whether the states have or have not done so is obviously a matter of local law. But the logically prior question, whether the states have theretofore acquired any rights from the United States which they may in turn confer on private persons, is a matter to be determined by federal law. *United States* v. *Oregon*, 295 U. S. 1, 27–28; *United States* v. *Holt Bank*, 270 U. S. 49, 55–56; *Brewer-Elliott Oil & Gas Co.* v. *United States*, 260 U. S. 77, 87.

Congress can, of course, by express language or by implication incorporate local law into federal

statutes. But "the construction of grants by the United States is a federal not a state question * * *, and involves the consideration of state question only insofar as it may be determined *as a matter of federal law*[16] that the United States has impliedly adopted and assented to a state rule of construction as applicable to its conveyances." *United States* v. *Oregon*, 295 U. S. 1, 28; *Board of Comm'rs* v. *United States*, 308 U. S. 343, 349–350, 351–352.

That Congress did not in this statute import local law as the measure of the state's powers over the right-of-way is suggested by a number of considerations. Only "the opening and establishing" of the public highway is to be governed by state law.[17] Concerning the nature of the state's interest in the right-of-way and the collateral uses to which the state can subject the land thus used for a highway, the Act says nothing except that the grant is for "public highway" purposes. But the absence of an explicit declaration as to whether local law is to measure the size of the congressional gift does not mean that Congress intended the state's policy in this matter to prevail. It is the character of a donation by Congress which is to be determined, and some-

[16] Italics added.

[17] For example, deciding whether a state or county agency builds the road, or whether funds shall be appropriated by a bond issue or in some other way, or contracting for the construction of the road, or determining the terms and

thing more explicit than the language here used would seem necessary if Congress intended the size of its bounty to be determined by the recipient. This is particularly so when Congress has indicated in related legislation that the Federal Government is not indifferent to the uses to which rights-of-way over the lands involved are to be put. In the face of the explicit and comprehensive scheme by which Congress has seen fit to regulate the grants of rights-of-way over Indian lands it is difficult to believe that varying state policies over collateral uses of highways [18] were

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specifications for the construction job must accord with the requirements of state policy.

[18] In some jurisdictions, including Oklahoma (*Nazworthy* v. *Illinois Oil Co.*, 176 Okla. 37, 54 P. (2d) 642 (1936), it has been held that the state may authorize the use of its highways for telephone, telegraph and power lines without imposing an additional burden or servitude upon the servient estate. The court below apparently believed there were no cases to the contrary (R. 31). Such is not the fact, however. There are a great number of decisions holding that a private owner who grants to the state an easement across his land for highway purposes is entitled to additional compensation, and further easements must be procured, if the highway is to be used for the erection of telephone, telegraph or electric transmission lines. *Cathey* v. *Arkansas Power & Light Co.*, 193 Ark. 92, 97 S. W. (2d) 624, 626 (1936); *Gurnsey* v. *Northern California Power Co.*, 160 Cal. 699, 709, 117 Pac. 906, 910 (1911); *Burrall* v. *American Telephone & Telegraph Co.*, 224 Ill. 266, 268, 79 N. E. 705 (1906); *Maryland Telephone & Telegraph Co.* v. *Ruth*, 106 Md. 644, 653, 68 Atl. 358, 360 (1907); *Bronson* v. *Albion Tel. Co.*, 67 Neb. 111, 116, 93 N. W. 201, 202 (1903); *Nicoll* v. *New York & N. J. Tel. Co.*, 62 N. J. Law 733, 736, 42 Atl. 583, 584 (1899); *Tri-State Telephone & Telegraph Co.* v.

meant to be adopted.[19] In any event, a clear congressional expression would seem to be required before state notions as to the collateral uses of highways can be imported. No such expression appears either in this statute or elsewhere.

The suggestion by the court below that the allottee has already received a substantial sum as compensation for the highway permit is beside the point. Presumably Congress in prescribing the requirements for rights-of-way for highways and for various utility purposes considered the problem of adequate and overlapping compensation and left its resolution to appropriate administrative officers. The Secretary can, and might very

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Cosgriff, 19 N. D. 771, 780, 124 N. W. 75, 79 (1909); *Ohio Bell Telephone Co.* v. *Watson Co.*, 112 Ohio St. 385, 395, 147 N. E. 907, 910 (1925); *Southwestern Telegraph & Telephone Co.* v. *Smithdeal*, 103 Tex. 128, 133, 124 S. W. 627 (1910); *Western Union Tel. Co.* v. *Williams*, 86 Va. 696, 705, 11 S. E. 106, 108 (1890); *Krueger* v. *Wisconsin Tel. Co.*, 106 Wis. 96, 109, 81 N. W. 1041 (1900). Cf. *Brown* v. *Asheville Electric Light Co.*, 138 N. C. 533, 538, 51 S. E. 62, 65 (1905).

[19] Indeed, it is doubtful whether with respect to the particular section here involved, state policies were intended to control even in the absence of any national policy. Cf. *Board of Comm'rs* v. *United States*, 308 U. S. 343. It should be noted that another section of the same statute permits the states to acquire a more substantial interest in the land than is granted by the section here involved. If broader powers over the use of the right-of-way are desired by the state, it can proceed under the second paragraph of Section 3, by condemnation. Act of March 3, 1901, c. 832, 31 Stat. 1084, 25 U. S. C. 357; 49 L. D. 396, 397–398 (1923).

well,[20] permit power lines to be placed along existing highways without requiring the payment of additional compensation to the allottee or the tribe. That, however, is a matter to be decided by the Secretary of the Interior. Whether or not Congress provided that he is to retain the power to decide that question is the issue in this case. It is submitted that Congress did so provide, and the specific conditions which Congress has seen fit to impose must be given effect.

CONCLUSION

For the foregoing reasons it is submitted that the judgment of the court below affirming the district court's dismissal of the Government's petition should be reversed with directions to grant the relief requested.

Respectfully submitted,

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NOVEMBER 1942.

[20] Cf. 25 Code of Federal Regulations, Sec. 256.53, which requires the local superintendent, in making appraisals for highway damages, to keep in mind resulting benefits, and in cases where no actual damage is suffered to "counsel" the Indians to give their consent without compensation.

APPENDIX

Act of February 15, 1901, c. 372, 31 Stat. 790, 43 U. S. C. sec. 959:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forest and other reservations of the United States, and the Yosemite, Sequoia, and General Grant national parks, California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe lines, electrical, telegraph, and telephone lines and poles, by any citizen, association, or corporation of the

United States, where it is intended by such to exercise the use permitted hereunder or any one or more of the purposes herein named: *Provided,* That such permits shall be allowed within or through any of said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the Department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest: *Provided further,* That all permits given hereunder for telegraph and telephone purposes shall be subject to the provision of title sixty-five of the Revised Statutes of the United States, and amendments thereto, regulating rights of way for telegraph companies over the public domain: *And provided further,* That any permission given by the Secretary of the Interior under the provisions of this Act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park.

Sections 3 and 4 of the Act of March 3, 1901, c. 832, 31 Stat. 1058, 1083–1084, 25 U. S. C. secs. 319, 357, 311:

SEC. 3. That the Secretary of the Interior is hereby authorized and empowered to grant a right of way, in the nature of an easement, for the construction, operation, and maintenance of telephone and telegraph lines and offices for general telephone and telegraph business through any Indian reservation, through any lands held by an Indian tribe or nation in the Indian Territory, through any lands reserved for an

Indian agency or Indian school or for other purpose in connection with the Indian service, or through any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation, upon the terms and conditions herein expressed. No such lines shall be constructed across Indian lands, as above mentioned, until authority therefor has first been obtained from the Secretary of the Interior, and the maps of definite location of the lines shall be subject to his approval. The compensation to be paid the tribes in their tribal capacity and the individual allottees for such right of way through their lands shall be determined in such manner as the Secretary of the Interior may direct, and shall be subject to his final approval; and where such lines are not subject to State or Territorial taxation the company or owner of the line shall pay to the Secretary of the Interior, for the use and benefit of the Indians, such annual tax as he may designate, not exceeding five dollars for each ten miles of line so constructed and maintained; and all such lines shall be constructed and maintained under such rules and regulations as said Secretary may prescribe. But nothing herein contained shall be so construed as to exempt the owners of such lines from the payment of any tax that may be lawfully assessed against them by either State, Territorial, or municipal authority; and Congress hereby expressly reserves the right to regulate the tolls or charges for the transmission of messages over any lines constructed under the provisions of this Act: *Provided*, That incorporated cities

and towns into or through which such telephone or telegraphic lines may be constructed shall have the power to regulate the manner of construction therein, and nothing herein contained shall be so construed as to deny the right of municipal taxation in such towns and cities.

That lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

SEC. 4. That the Secretary of the Interior is hereby authorized to grant permission, upon compliance with such requirements as he may deem necessary, to the proper State or local authorities for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated, through any Indian reservation or through any lands which have been allotted in severalty to any individual Indians under any laws or treaties but which have not been conveyed to the allottees with full power of alienation.

Act of March 11, 1904, c. 505, 33 Stat. 65, 25 U. S. C. sec. 321:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior is hereby authorized and empowered to grant a right of way in the nature of an easement for the construction, operation, and maintenance of pipe lines for the conveyance of oil and gas through any Indian reservation, through any lands held by an Indian tribe

or nation in the Indian Territory, through any lands reserved for an Indian agency or Indian school, or for other purpose in connection with the Indian service, or through any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation, upon the terms and conditions herein expressed. No such lines shall be constructed across Indian lands, as above mentioned, until authority therefor has first been obtained from, and the maps of definite location of said lines approved by, the Secretary of the Interior: *Provided,* That the construction of lateral lines from the main pipe line establishing connection with oil and gas wells on the individual allotments of citizens may be constructed without securing authority from the Secretary of the Interior and without filing maps of definite location, when the consent of the allottee upon whose lands oil or gas wells may be located and of all other allottees through whose lands said lateral pipe lines may pass has been obtained by the pipe line company: *Provided further,* That in case it is desired to run a pipe line under the line of any railroad, and satisfactory arrangements cannot be made with the railroad company, then the question shall be referred to the Secretary of the Interior, who shall prescribe the terms and conditions under which the pipe line company shall be permitted to lay its lines under said railroad. The compensation to be paid the tribes in their tribal capacity and the individual allottees for such right of way through their lands shall be determined in such manner as the Secretary of the Inte-

rior may direct, and shall be subject to his final approval. And where such lines are not subject to State or Territorial taxation the company or owner of the line shall pay to the Secretary of the Interior, for the use and benefit of the Indians, such annual tax as he may designate, not exceeding five dollars for each ten miles of line so constructed and maintained under such rules and regulations as said Secretary may prescribe. But nothing herein contained shall be so construed as to exempt the owners of such lines from the payment of any tax that may be lawfully assessed against them by either State, Territorial, or municipal authority. And incorporated cities and towns into and through which such pipe lines may be constructed shall have the power to regulate the manner of construction therein, and nothing herein contained shall be so construed as to deny the right of municipal taxation in such towns and cities, and nothing herein shall authorize the use of such right of way except for pipe line, and then only so far as may be necessary for its construction, maintenance, and care: *Provided*, That the rights herein granted shall not extend beyond a period of twenty years: *Provided further*, That the Secretary of the Interior, at the expiration of said twenty years, may extend the right to maintain any pipe line constructed under this Act for another period not to exceed twenty years from the expiration of the first right, upon such terms and conditions as he may deem proper.

SEC. 2. The right to alter, amend, or repeal this Act is expressly reserved.

Act of March 4, 1911, c. 238, 36 Stat. 1235, 1253, 43 U. S. C. sec. 961:

> That the head of the department having jurisdiction over the lands be, and he hereby is, authorized and empowered, under general regulations to be fixed by him, to grant an easement for rights of way, for a period not exceeding fifty years from the date of the issuance of such grant, over, across, and upon the public lands, national forests, and reservations of the United States for electrical poles and lines for the transmission and distribution of electrical power, and for poles and lines for telephone and telegraph purposes, to the extent of twenty feet on each side of the center line of such electrical, telephone and telegraph lines and poles, to any citizen, association, or corporation of the United States, where it is intended by such to exercise the right of way herein granted for any one or more of the purposes herein named: *Provided,* That such right of way shall be allowed within or through any national park, national forest, military, Indian, or any [21] other reservation only upon the approval of the chief officer of the department under whose supervision or control such reservation falls, and upon a finding by him that the same is not incompatible with the public interest: *Provided,* That all or any part of such right of way may be forfeited and annulled by declaration of the head of the department having jurisdiction over the lands for nonuse for a period of two years or for abandonment.

[21] The word "any" appears before the words "other reservation" in the Statutes at Large, but does not appear in the United States Code.

That any citizen, association, or corporation of the United States to whom there has heretofore been issued a permit for any of the purposes specified herein under any existing law, may obtain the benefit of this Act upon the same terms and conditions as shall be required of citizens, associations, or corporations hereafter making application under the provisions of this statute.

U. S. GOVERNMENT PRINTING OFFICE: 1948

No. 171

In the Supreme Court of the United States

OCTOBER TERM, 1942

UNITED STATES OF AMERICA,
Petitioner,

VERSUS

OKLAHOMA GAS & ELECTRIC COMPANY, A CORPORATION,
Appellee.

BRIEF OF APPELLEE

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November, 1942.

UTTERBACK TYPESETTING CO., OKLAHOMA CITY, OKLA.

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BRIEF OF APPELLEE

The facts in this case were the subject of stipulation (R-8).

In 1926, the State of Oklahoma applied to the Secretary of the Interior

> "To grant permission in accordance with Section 4 of the Act of March 3, 1901, 31 Stat. 1058, 1084, to open and establish a public highway" (R-10).

across the eighty acre trust allotment in question. Section 4 of the Act authorizing such action is as follows:

> "That the Secretary of the Interior is hereby authorized to grant permission upon compliance with such requirements as he may deem necessary to the proper state or local authorities for the opening and establishing of public highways in accordance with the laws of the state or territory in which the lands are situate through any Indian reservation or through any lands which have been allotted in severalty to any individual Indians under any laws or treaties, but which

have not been conveyed to the allottees with full power of alienation."

The eighty acres in question falls within the latter classification of lands through which the Secretary is authorized to grant permission for the construction of highways, as it is land allotted in severalty to an individual Indian without full power of alienation. (In view of a portion of the argument made by the Government, we ask the court to note in this statute that a specific distinction is made between an *Indian reservation and allotments in severalty*).

After the State's application for permission to construct a highway was approved in 1928 (R-9), the State of Oklahoma in 1936 (R-11), granted to the Oklahoma Gas & Electric Company the right to use the highway (*Title 69, Sec. 57, Okla. Stat. 1941 (see appendix),*) and said Company thereafter erected thereon

"Its rural service line for supplying electric current to farmers living adjacent to the aforesaid public highway" (R-11).

The position of the Company throughout this case has been that since under the laws of the State of Oklahoma its use of the highway constituted a proper highway use, it was unnecessary to either condemn a portion of the highway for its electric line under the last paragraph of *Section 3, Act of March 3, 1901*, if that were possible, or to make, as the Government contends, application to the Secretary of the Interior to use the highway.

Condemnation proceedings were never instituted since they were unnecessary, and in addition we know of no way in which the Company could successfully condemn a portion of a public highway. No application was ever made to the Secretary of the Interior for two reasons: First, because he has no control over the use of public highways in the State of Oklahoma; second, no act of Congress authorizes him to grant rights-of-way to electric companies over allotted land.

Answer to the Government's Argument

Opinions in this case were written by both the United States District Court for the Western District of Oklahoma, 37 *Fed. Supp.* (R-13) and by the Circuit Court of Appeals for the Tenth Circuit, 127 *Fed. Supp.*, 349 (R-25). The District Court's decision, is based upon the proposition that the grant authorized by Congress was for the opening and establishment of highways in accordance with the laws of the State; that under the laws of Oklahoma, the use by the Company was a proper highway use just as much as was the use thereof by automobiles, trucks, or horse-drawn vehicles, and that the Secretary of the Interior had no control whatever over uses of the highway which were proper under the law.

The Circuit Court of Appeals in addition to approving the basis of the District Court's decision, went further and answered adversely the contention of the Government to the effect that the Secretary of the Interior under the *Act of February* 15, 1901, 31 *Stat.* 790, 25 *U. S. C. Section* 959,

and the *Act of March* 4, 1911, 36 *Stat.* 1235, 1253, 43 *U. S. C., Section* 961, had authority to permit the crossing of allotments. It held that the only way in which the electric company could secure a separate right-of-way across the allotment in question, in the absence of a highway, was by condemnation under the laws of the State, *Section* 3, *Act of March* 3, 1901, 31 *Stat.* 1058, 25 *U. S. C., Section* 357.

Reply to the Government's Proposition 1, Page 14, Government's Brief

The Government contends that the *Act of February* 15, 1901, 43 *U. S. C., Section* 959, 31 *Stat.* 790, authorizes the Secretary to grant a permit for an electric line across an individual trust allotment. The statute does not so provide. It covers public lands, forests and *other reservations* of the United States. It next contends that under the *Act of March* 4, 1911, 43 *U. S. C., Section* 961, 36 *Stat.* 1253, the Secretary also has that right. Again the statute specifically applies only to public lands, national forests and *reservations* of the United States. There is then a proviso that such rights-of-way, if within a national park, national forest, military, Indian or other reservation, shall receive the approval of the Chief Officer of the Department under whose supervision or control such reservation falls.

The Circuit Court of Appeals held that neither Act granted to the Secretary any authority insofar as electric lines were concerned crossing Individual Indian allotments. Neither statute refers to allotments in severalty. The Government is, therefore, forced to contend that allotments are

included within the term "reservations" and cites one case as sustaining its view, *United States* v. *Celestine*, 215 U. S. 278. This Court therein had before it for consideration a criminal statute dealing with jurisdiction over crimes by Indians "within the limitation of any Indian reservation." The offense was committed within the limits of the Tulalip Indian Reservation in which the defendant and the murdered woman were the owners of patented land. The land was physically within the limits of the reservation. Since the reservation still existed, the fact that patents had been issued to land therein did not remove them from the reservation's physical limits, for the Court said:

> "When Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress."

If the allotment had not been within the physical limits of the reservation, then the jurisdiction of the court would have depended upon another provision of the Act. The fact of allotment within the limits of an established and existing reservation could not remove the land physically thereform.

In the instant case the Kickapoo Indian Reservation was established in the then Indian Territory, now Oklahoma, by executive order in 1883. *United States* v. *Reily*, 290 U. S. 33, 36. The tribe sold the reservation "without any reservation whatever" to the United States which agreed in consideration of the transfer to allot to every member of the tribe eighty acres in the tract ceded and to make a money payment. *Vol. 28, Stat. at Large, Ch. 203, Page 557,*

et seq., Articles 1 and 2. Article 4 provides that title to the allotments should be held in trust. *Article 6* provides that wherever in the reservation ceded any religious society occupied a portion thereof, it could receive an *allotment* not to exceed one hundred sixty acres, and "such land shall not be subject to *homestead entry*." At page 560 the following appears:

> "The United States commissioners aforesaid and the Kickapoos have agreed on terms of *sale of their reservation*, except the commissioners insist on the Indians taking lands in allotment, while the Indians insist in taking an equal amount of land as a *diminished reservation*, the title to be held in common."

It will be observed from the foregoing that the parties recognized that the reservation was being sold and that the Indians were taking allotments; that the Indians were not favorably disposed toward the allotment idea and desired to retain in lieu thereof a "diminished reservation," title to which would be held in common. On page 561, the Secretary of the Interior, to whom the disputed question under agreement of the parties was submitted for decision, disposed of the matter as follows:

> "Now I, John W. Noble, Secretary of the Interior, and as said Secretary, do hereby decide that the Kickapoo Indians take their lands in *allotment* and *not to be held in common*, and I so direct."

The foregoing statute makes it clear beyond any doubt that there is a very decided distinction between an Indian reservation and an Indian allotment. The reservation of the Kickapoos ceased to exist upon its sale to the United States in 1894. The purpose of the sale was, of course, clear. It was

to secure for the United States more land which could be opened for homestead entry as was subsequently done in this instance.

As the Circuit Court of Appeals' opinion points out, Congress has recognized the distinction repeatedly between a reservation and an individual allotment. Take the statute under which the highway in question was opened, *Section 4, Act of March* 3, 1901, it provides that such highway grant may be made through any Indians reservation or through any lands which have been *allotted in severalty*. In the *Act of March* 11, 1904, easements were authorized for pipelines through Indian reservations and through *allotted lands*. *The Act of March* 3, 1901, provides for rights of way for telegraph and telephone lines through Indian reservations and *allotted lands*. It is then provided in regard to *allotted lands only*, that they may be condemned for any public purpose under the laws of the state or territory where located in the same manner as land owned in fee may be condemned. *Section* 3, *Act of March* 3, 1901.

United States v. *Minnesota*, 113 Fed. (2d) 770, as the Circuit Court below pointed out, recognized a distinction between allotments in severalty and reservations.

We are unable to follow the Government's reasoning as to the dire consequences which would ensue if its position is not sustained. If such permits are not authorized, the allottee is certainly protected, as no one could go on his land without first instituting condemnation proceedings if such were authorized by the state law.

Certain Decisions of the Interior Department are cited as evidencing an administrative construction to the effect that reservation "includes individual trust allotments within an Indian reservation" (P. 18, Government's brief). The trust allotment involved herein, however, is not within an Indian reservation, title to which passed to the United States before any allotment was ever made. The situation is more analogous to that dealt with in *Icicle Canal Co.*, 44 L. D.

Answer to Government's Proposition 2, Page 20, Government's Brief

Since the *Acts of February* 15, 1901, *and March* 4, 1911, have no application to the instant case, the Secretary of the Interior had no authority to grant the Company permission to cross the allotment. The Company, however, under *Section* 3, of the *Act of March* 3, 1901, 25 *U. S. C., Section* 357, 31 *Stat.* 1084, is vested with authority to condemn a right-of-way, 49 L. D. 396. There was no need, however, for it to exercise such right in view of the fact that under the law of Oklahoma its use of a highway is a property highway use, and there was a highway across the allotment. The Company had the right under the local law, subject to proper regulations protecting the rights of all highway users, to use the highway just as any other person in the state has a right to use the highways of the state for proper highway purposes.

The construction of the Congressional grant in question is, of course, to be determined by federal and not state law, that Congress has absolute control over public and

Indian lands and that Congress, had it deemed it wise, might condition or restrict highway grants in any manner it might desire, is not in controversy.

Under *Section* 4, *Act of March* 3, 1901, Congress has authorized the "opening and establishment of public highways in accordance with the laws of the state * * * in which the lands are situated."

This grant, it will be observed, is unrestricted, and by its express terms there is incorporated into the federal law the state law. The District court, rightly, therefore, stated what should constitute a proper use of the highway was "left to the determination of the State of Oklahoma."

The question narrows itself, therefore, down to what constitutes a proper use of the state highway. Will this use be determined by federal law or by state law? Since there is no federal law on the subject, it is, of course, to be determined by state law which, by adoption, is the federal law.

Congress must have realized that the laws of the several states in regard to highways were not uniform, and it therefore did not endeavor to specify their width, use, surfacing, *et cetera*, but expressly left all such matters to local law.

What is a public highway? Congress has said we must look to the laws of the respective states for that determination, and whatever under the laws of the state constitute a public highway, is the extent of the grant or dedication which Congress has authorized.

The Act does not grant a mere strip of land, it grants a public *highway* "in accordance with the laws of the State." The use to which a strip of land is devoted or is to be devoted, determines whether or not it is a public highway, a private road, or what not. The Government's position in reality is that the Act simply authorizes the grant of a strip of land, the use of which thereafter was to be subject to the control of the Secretary of the Interior. A mere strip of land, however, we submit, is not a public highway.

Lawrence, et al., v. *Ewert*, 21 S. D. 580, 114 N. W. 709, 710.

The court judicially knows, we believe, that there are thousands of Indian allotments in Oklahoma, across many of which run public highways, and we believe the State would be greatly surprised to learn that all that the Act in question authorizes is for it to pay for various detached strips of land constituting portions of its highways, then bear the expense of their improvement as parts thereof, all for the purpose of having the use of such portions regulated by the Secretary of the Interior. If such is true, uniform regulation of the use of the highways of the state is an impossibility. The Government's error, we suggest, is in failing to distinguish between a mere strip of land or right-of-way and a *public highway*.

Some light, we believe, will be thrown upon this subject by a consideration of another Congressional Highway Act (*Act of July 26, 1866, Chapter 262, Section 8; 14 Stat., 253, U. S. C. A., Title 43, Section 932*):

"The right-of-way for the construction of highways over public lands not reserved for public use is hereby granted."

This Act is very general and no specific adoption of State law is contained therein, yet in so far as we can ascertain, the uniform construction of the Act has been that the incidents granted thereunder are governed by the laws of the State in which the lands are situated.

Smith v. *Mitchell*, 21 Wash. 536, 58 Pac. 667.

Arizona Commercial Copper Co., v. *Gila County, et al.* 12 Ariz. 226, 100 Pac. 777, 778.

Streeter v. *Stalnaker*, 61 Neb. 205, 85 N. W. 47.

Rose v. *Bottyer*, 81 Cal. 122, 22 Pac. 393.

Town of Rolling v. *Emerick*, 122 Wis. 134, 99 N. W. 464.

Kaloen v. *Pilot Mount Township*, 33 N. D. 529, 157 N. W. 672, 675.

Butte v. *Mikoswitz*, 39 Mont. 350, 102 Pac. 593.

State v. *Tucker*, 237 Wis. 310, 296 N. W. 645.

In *Colorado* v. *Toll, Superintendent*, 268 U. S. 228, the regulation of the use of a highway established pursuant to the Act of 1886 was involved. The superintendent of a National Park subsequently established and traversed by the highways sought to exclude certain classes of automobiles therefrom, in other words to regulate a use proper under state law. This Court denied the superintendent's jurisdiction under the National Park Act and impliedly recognized that the control of the use of a highway established under the general highway Act of 1866 rested in the State.

The construction for which we contended is further fortified by numerous cases dealing with other Government grants, and the rule to be gathered therefrom is that in the absence of special restrictions or limitations, they are to be construed in accordance with the local law.

Hardin v. *Jordan*, 140 U. S. 371, 384.

Oklahoma v. *Texas*, 258 U. S. 574, 595.

United States v. *Oregon*, 295 U. S. 1.

Brewer-Elliott Oil & Gas Co., v. *United States*, 260 U. S. 77.

The Act in question, we submit, constituted a dedication of the strip of land involved herein by the United States as a public highway in accordance with state law. After such dedication, it is not subject to Federal control so long as it is devoted to highway uses.

The Government's position, as we understand it, is that Congress adopted the state law only to a very restricted extent and that all proper highway uses under the local law are not included in the grant. No guide is suggested, however, for determining whether a particular use proper under state law is also to be deemed proper by the Secretary of the Interior. Congress certainly never intended this important matter to remain suspended subject merely to the whim of some official. Had Congress not been specific and had the Act in question been as general as the Act of 1886, since there is no federal law dealing with the use which highways granted are to be subject, under the cases we have heretofore referred to, the local law would govern.

While we have encountered some difficulty throughout this case in clearly following the argument of the Government, if it could be that the uses to which a highway granted under the Act of 1901 are to be determined by the uses to which highways were devoted at that time, such a position is answered by the case of

Pacific Gas & Electric Co. v. *United States*, 45 Fed. (2d) 708, 719.

Such a position is, of course, untenable as under it a highway established under the Act of 1866 could only be devoted to uses which were in existence then, and a highway opened under some act, say in 1800, would be still further limited in its uses.

We do not contend that the highway in question can be devoted by the state to any purpose other than a proper highway use or purpose. The law as to what uses a highway may be devoted is not uniform in all states. As to what it may be in states other than Oklahoma, we are not interested, as the Oklahoma law on the subject is settled and controlling. In Oklahoma an electric line is no more an additional servitude than is the use of a highway by a truck, automobile, horse and buggy or wheelbarrow.

Nazworthy v. *Illinois Oil Co.*, 176 Okla., 37, 54 Pac. (2d) 642.

Jafek v. *Public Service Co.*, 183 Okla. 32, 79 Pac. (2d) 813.

Stanolind Pipe Line Co. v. *Winford*, 176 Okla. 47, 54 Pac. (2d) 646.

Okmulgee Producers & Manufacturers' Gas Co. v. Franks, 177 Okla. 456, 60 Pac. (2d) 771.

We have devoted some space in this brief in answer to the Government's Proposition 1, since we felt it could be easily shown it was without substance. That proposition, however, has very little to do with this case, since even if the statutes in question did grant the authority contended for by the Secretary, the Company would not be required to secure a permit from him, as would have been the case had it desired to cross the allotment at some point other than on the public highway. It might have condemned under *Section 3 of the Act of March 3, 1901*. Because there is a statute authorizing condemnation, however, does not mean that the Company must institute condemnation proceedings in every instance, and that it cannot, under the local law, use the highway just as any other member of the public.

If we assume for the sake of argument only that the Company's use of the highway under Oklahoma law was not a proper highway use, the owners of adjoining land would be entitled to compensation only for subjecting their land to an additional servitude.

They could not compel the removal of the lines since the Company is a public utility vested under state law (*Title 27, Section 7, Okla. Stat. 1941 (appendix)*) and under the *Act of March 3, 1901, Ch. 832, Sec. 3, 31 Stat. 1084, 25 N. S. C., Section 357*, with the power of eminent domain.

It is stipulated:

"That said rural lines so constructed is a part and parcel of defendant's system of rural electrification

adjacent to and extending from the City of Shawnee, Oklahoma; used in supplying electricity to its customers."

Peckham v. *A. T. & S. F. Ry. Co.*, 88 Okla. 174, 212 Pac. 427.

St. Louis & Santa Fe Ry. Co. v. *Mann*, 79 Okla. 160, 192 Pac. 231.

City of Seminole, et al. v. *Fields, et al.*, 172 Okla. 187, 43 Pac. (2d) 64.

Blackwell E. & S. W. Ry. Co., et al. v. *Bebout*, 19 Okla. 63, 60, 91 Pac. 877.

Vinson v. *Oklahoma City*, 179 Okla. 590, 593, 66 Pac. (2d) 933.

Oklahoma City v. *Wells*, 185 Okla. 369, 370, 91 Pac. (2d) 1077.

It is respectfully submitted that the judgment of the lower court should be affirmed.

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APPENDIX

Title 69, Sec. 57, Oklahoma Statutes, 1941:

PUBLIC UTILITIES IN STATE HIGHWAYS —LOCATION AND REMOVAL. The location and removal of all telephone, telegraph and electric light and power transmission lines, poles, wires and conduits and all pipe lines and tramways, erected or constructed, or hereafter to be erected or constructed upon or across any State Highway, insofar as the public travel and traffic is concerned, and insofar as the same may interfere with the construction or maintenance of any such highway, shall be under the control and supervision of the State Commissioner of Highways. The Commissioner, or some other officer selected by the Commissioner, shall serve a written notice upon the person or corporation owning or maintaining any such lines, poles, wires, conduits, pipe lines, or tramways, which notice shall contain a plan or chart indicating the places on the right-of-way at which such lines, poles, wires, conduits, pipe lines or tramways, may be maintained. The notice shall also state the time when the work of improving of said roads is proposed to commence, and shall further state that a hearing shall be had upon a proposed plan of location and matters incidental thereto, giving the place and date of such hearing. Immediately after such hearing the said owner shall be given a notice of the findings and and orders of the Commissioner and shall be given a reasonable time thereafter to comply therewith; provided, however, that the effect of any change ordered by the Commissioner shall not be to re-

move all or any part of such lines, poles, wires, conduits, pipe lines or tramways from the right-of-way of the highway. * * *

Title 27, Sec. 7, Oklahoma Statutes, 1941:

LIGHT, HEAT OR POWER BY ELECTRICITY OR GAS—EMINENT DOMAIN SAME AS RAILROADS. Any person, firm or corporation organized under the laws of this State, or authorized to do business in this State, to furnish light, heat or power by electricity or gas, or any other person, association or firm engaged in furnishing lights, heat or power by electricity or gas shall have and exercise the right of eminent domain in the same manner and by like proceedings as provided for railroad corporations by laws of the State. Laws 1917, ch. 230, p. 431, 3.

SUPREME COURT OF THE UNITED STATES.

No. 171.—October Term, 1942.

The United States of America, Petitioner, vs. Oklahoma Gas & Electric Company. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[February 15, 1943.]

Mr. Justice Jackson delivered the opinion of the Court.

The United States sued the Oklahoma Gas and Electric Company in the United States District Court asking a declaratory judgment that the Company illegally occupies with its pole line certain Indian land, and a mandatory injunction to terminate such occupation. The case turns on whether permission to the State of Oklahoma to establish a highway over allotted Indian land given under § 4 of the Act of March 3, 1901,[1] includes the right to permit maintenance of rural electric service lines within the highway bounds.

The United States at all relevant times held title to half of a quarter section of land in Oklahoma in trust for She-pah-tho-quah, a Mexican Kickapoo Indian allottee thereof; and since her death, for her heirs. The State of Oklahoma applied to the Secretary of the Interior "to grant permission in accordance with § 4 of the Act of March 3, 1901 (31 Stat. L. 1058, 1084), to open and establish a public highway" across the land in question. The highway width was 80 feet, and it extended 2577 feet on these lands, occupying 4.55 acres thereof. The State paid therefor $1,275 as compensation to the heirs of She-pah-tho-quah, and on January 20, 1928, the map of definite location was on behalf of the Secretary endorsed "Approved subject to the provisions of the Act of March 3, 1901 (31 Stat. L. 1058, 1084), Department regulations thereunder; and subject also to any prior valid existing right or adverse claim."

[1] 31 Stat. 1058, 1084, 25 U. S. C. § 311.

Section 4 of the Act of March 3, 1901, under which the application was specifically made and granted, provides:

"That the Secretary of the Interior is hereby authorized to grant permission, upon compliance with such requirements as he may deem necessary, to the proper State or local authorities for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated, through any Indian reservation or through any lands which have been allotted in severalty to any individual Indians under any laws or treaties but which have not yet been conveyed to the allottees with full power of alienation."

Apparently the Secretary has never issued a regulation applicable to this case. Cf. 25 Code of Federal Regulations § 261.1 *et seq.*

The highway was opened, and in 1936 the Oklahoma State Highway Commission, with statutory authority to act in the matter,[2] granted respondent the license under which it occupies a portion of the highway with its rural electric service line. The license is in terms revocable at will, provides for location of the poles 38 feet from the center of the highway, and requires all lines to be kept in good repair. The licensee assumes all liability for damage, and the license recites that it is "granted subject to any and all claims made by adjacent property owners as compensation for additional burden on such adjacent and abutting property."

The Secretary considered this use of the property not warranted by his permission to the State to establish a highway under § 4 of the Act of March 3, 1901. He demanded that the Company apply to him under the Acts of February 15, 1901 and March 4, 1911[3] for permission to maintain its lines and, when the Company refused, instituted this action. The District Court dismissed the complaint, and the Circuit Court of Appeals for the Tenth Circuit affirmed. 37 F. Supp. 347, 127 F. 2d 349. The question appeared important to the administration of Indian affairs, and we granted certiorari. — U. S. —.

It is not denied that under the laws of Oklahoma the use made of the highway by respondent, the State's licensee, is a lawful and proper highway use, imposing no additional burden for which a grantor of the highway easement would be entitled to compensation. But the Government denies that the Act of March 3, 1901,

[2] 69 Oklahoma Stat. (1941) § 57.

[3] 31 Stat. 790, 43 U. S. C. § 959; 36 Stat. 1235, 1253, 43 U. S. C. § 961. These are set out and discussed *infra*, p. 5 *et seq.*

providing "for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated," submits the scope of the highway use to state law. Its interpretation gives the Act a very limited meaning and substantially confines state law to governing procedures for "opening and establishment" of the highway.[4] It offers as examples of what is permitted to state determination, whether a state or county agency builds the road, whether funds shall be raised by bond issue or otherwise, and the terms and specifications of the construction contract. The issue is between this narrow view of the State's authority and the broader one which recognizes its laws as determining the various uses which go to make up the "public highway," opening and establishment of which are authorized.

We see no reason to believe that Congress intended to grant to local authorities a power so limited in a matter so commonly subject to complete local control.

It is well settled that a conveyance by the United States of land which it owns beneficially or, as in this case, for the purpose of exercising its guardianship over Indians, is to be construed, in the absence of any contrary indication of intention, according to the law of the State where the land lies.[4] Presumably Congress intended that this case be decided by reference to some law, but the Government has cited and we know of no federal statutory or common-law rule for determining whether the running of the electric service lines here involved was a highway use. These considerations, as well as the explicit reference in the Act to state law in the matter of "establishment" as well as of "opening" the highway, indicate that the question in this case is to be answered by reference to that law, in the absence of any governing administrative ruling, statute, or dominating consideration of Congressional policy to the contrary. We find none of these.

Apparently the Secretary has never sought to solve the problem of this case by an administrative ruling, and whether he might do do is a question which the parties have neither raised nor discussed, and upon which we intimate no opinion.

In construing this statute as to the incidents of a highway grant we must bear in mind that the Act contemplated a con-

[4] Grand Rapids & Indiana R. R. Co. v. Butler, 159 U. S. 87; Whitaker v. McBride, 197 U. S. 510; Oklahoma v. Texas, 258 U. S. 574, 595-596; see Brewer Oil Co. v. United States, 260 U. S. 77, 88-89; United States v. Oregon, 295 U. S. 1, 28; cf. Board of Commissioners v. United States, 308 U. S. 343.

veyance to a public body, not to a private interest. There was not the reason to withhold continuing control over the uses of the strip that might be withheld wisely in a grant of indefinite duration to a private grantee. It is said that the use here permitted by the State is private and commercial, and so it is. But a license to use the highway by a carrier of passengers for hire, or by a motor freight line, would also be a private and commercial use in the same sense. And it has long been both customary and lawful to stimulate private self-interest and utilize the profit motive to get needful services performed for the public. The State appears to be doing no more than that.

This is not such a transmission line as might endanger highway travel or abutting owners with no compensating advantage. It is a rural service line, and to bring electric energy in to the countryside is quite as essential to modern life as many other uses of the highway. The State has granted nothing not revocable at will, has alienated nothing obtained under the Act, has permitted no use that would obstruct or interfere with the use for which the highway was established, and has not purported to confer any right not subsidiary to its own or which would survive abandonment of the highway.

The interpretation suggested by the Government is not shown to be necessary to the fulfillment of the policy of Congress to protect a less-favored people against their own improvidence or the overreaching of others; nor is it conceivable that it is necessary, for the Indians are subjected only to the same rule of law as are others in the State, and then only by permission of the Secretary, subject to compliance with "such requirements as he may deem necessary."

Oklahoma is spotted with restricted lands held in trust for Indian allottees. Complications and confusion would follow from applying to highways crossing or abutting such lands rules differing from those which obtain as to lands of non-Indians. We believe that if Congress had intended this it would have made its meaning clear.

The Government relies, however, on the Acts of February 15, 1901, and of March 4, 1911, which it says require the Secretary's consent to cross Indian land with electric lines, regardless of the prior grant of permission for the highway. We believe that they are inapplicable to the land in suit, and therefore need not determine what would be their effect if they did apply.

The Act of February 15, 1901, "An Act Relating to rights of way through certain parks, reservations, and other public lands",[5] authorizes the Secretary of the Interior "to permit the use of rights of way through the public lands, forest and other reservations of the United States, and the Yosemite, Sequoia, and General Grant national parks, California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes . . . to the extent of . . . not to exceed fifty feet on each side of the center line of such . . . electrical, telegraph, and telephone lines and poles . . .: *Provided*, That such permits shall be allowed within or through any of said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the Department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest: *Provided further*, That all permits given hereunder for telegraph and telephone purposes shall be subject to the provisions of title sixty-five of the Revised Statutes of the United States, and amendments thereto, regulating rights of way for telegraph companies over the public domain: *And provided further*, That any permission given by the Secretary of the Interior under the provisions of this Act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park."[6]

For all present purposes the Act of March 4, 1911 is the same as the above Act.[7]

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[5] H. R. Rep. No. 1850, 56th Cong., 1st Sess., indicates that the title of the Act, referring to public lands, was advisedly chosen.

[6] 31 Stat. 790, 43 U. S. C. § 959.

[7] 36 Stat. 1235, 1253, 43 U. S. C. § 961, providing:

"That the head of the department having jurisdiction over the lands be, and he hereby is, authorized and empowered, under general regulations to be fixed by him, to grant an easement for rights of way, for a period not exceeding fifty years from the date of the issuance of such grant, over, across, and upon the public lands, national forests, and reservations of the United States for electrical poles and lines for the transmission and distribution of electrical power, and for poles and lines for telephone and telegraph purposes, to the extent of twenty feet on each side of the center line of such electrical, telephone and telegraph lines and poles, to any citizen, association, or corporation of the United States, where it is intended by such to exercise the right of way herein granted for any one or more of the purposes herein named: *Provided*, That such right of way shall be allowed within or through any national park, national forest, military, Indian, or any other reservation

Neither statute makes any reference whatever to lands allotted to Indians in which the United States holds title in trust only to prevent improvident alienation. Their general tenor and particularly the second proviso of the Act of February 15, 1901, repel any inference that they were intended to govern the grant of rights of way over such lands. The effect of this proviso was to make any telephone or telegraph company which availed itself of the Act subject, as to Government business, to the rates set by the Postmaster General, and to make "all the . . . lines, property, and effects" of such a company subject to purchase by the Government at a value to be ascertained by an appraisal of five persons, two selected by the Postmaster General, two by the company, and one by the four so chosen.[8] It is rather difficult to believe that Congress ever intended to exact such conditions as part of the price of running a line across land in which the Government is interested only to the extent of holding title for the protection of an individual Indian allottee. It is particularly difficult in the context of the Acts, for if such were the intent it was defeated by giving an option to obtain the same rights by condemnation under state law and free of such restrictions. § 3 of the Act of March 3, 1901.[9]

The Government seeks to repel the force of these implications by asserting that the word "reservation" as employed in these Acts includes such land.

Section 4 of the Act of March 3, 1901 authorizes permission to run a highway "through any Indian reservation or through any lands which have been allotted in severalty to any individual Indians under any laws or treaties but which have not been con-

only upon the approval of the chief officer of the department under whose supervision or control such reservation falls, and upon a finding by him that the same is not incompatible with the public interest: *Provided*, That all or any part of such right of way may be forfeited and annulled by declaration of the head of the department having jurisdiction over the lands for nonuse for a period of two years or for abandonment."

See 40 L. D. 30, 31: "It will be observed that this act, which authorizes the granting of easements for electrical power transmission, and telephone and telegraph lines for stated periods not to exceed 50 years, follows, as closely as is possible in the accomplishment of its purposes, the language of the act of February 15, 1901 (31 Stat., 790), which authorizes mere revocable permits or licenses for such lines, and for other purposes. This act, therefore, merely authorizes additional or larger grants and does not modify or repeal the act of 1901, and should be construed and applied in harmony with it." See also, 46 Cong. Rec. 4014-4015.

[8] Comp. Stat. (1901) §§ 5266, 5267.

[9] 31 Stat. 1083-1084, 25 U. S. C. § 357.

veyed to the allottees with full power of alienation." The Act in § 3 also refers to "lands allotted in severalty," after already employing the word "reservation." If it included allotted lands without these words, Congress was employing language to no discernible purpose. We think Congress employed this language in the Act of March 3, 1901, to a purpose and with a clear distinction between reservations and allotted lands. Section 3 made allotted lands, but not reservations, subject to condemnation for any public purpose; § 4 made both reservations and allotted lands subject to highway permits by the Secretary. We think that the almost contemporaneous Act of February 15, 1901, in authorizing permits for electric companies through reservations, but not allotted lands, meant just what it said.

We have no purpose to decide anything more than the case before us. We do not say that "reservation" may never include allotted lands; all we hold is that if there is a distinction in fact, that distinction is carried into the Act. So we turn to the question whether these particular allotted lands were in fact within or without a "reservation."

She-pah-tho-quah, the allottee, was of the Kickapoo Tribe. In earlier times the Kickapoo Tribe occupied a treaty reservation in Kansas.[10] They became torn by internal dissentions. One faction remained on the old reservation in Kansas and received allotments there.[11] Others migrated, chiefly in 1852 and 1863, to Mexico and located on a reservation set apart for them by that Government. The Oklahoma Kickapoos comprise those who left Mexico, mostly in 1873, and returned to the United States. Ten years later a reservation was established for them by Executive Order in what was then Indian Territory, now Oklahoma. *United States* v. *Reily*, 290 U. S. 33, 35-36.

In 1891, however, these restless people negotiated a sale of their reservation to the Government "except the Commissioners insist on the Indians taking lands in allotment, while the Indians insist on taking an equal amount of land as a diminished reservation, the title to be held in common."[12] This disagreement was submitted to the Secretary of the Interior and he decided that the "Indians take their lands in allotment and not to

[10] Treaties of October 24, 1832, 7 Stat. 391; May 18, 1854, 10 Stat. 1078.
[11] Treaty of June 28, 1862, 13 Stat. 623.
[12] 27 Stat. 560.

be held in common."[13] The Kickapoo Tribe thereupon, on September 9, 1891 did "cede, convey, transfer, and relinquish, forever and absolutely, without any reservation whatever, all their claim, title and interest" to the reservation lands.[14] In consideration each of the Kickapoos, estimated at about 300 in number, was allotted 80 acres of such land with a per capita cash payment.[15] The transaction was ratified, and carried out on the part of the United States and the land acquired by the United States was opened to settlement.[16] Thus, the Kickapoo reservation was obliterated, the tribal lands were no more, and only individual allotments survived. We think it clear that the term "reservation" as used in the statutes in question had no application to such lands.

It is true that the opinion in *United States* v. *Reily*, *supra*, at 35, used the term "Kickapoo Reservation" to describe a region of Oklahoma as of a time subsequent to the dissolution. It is clear from the context of the opinion, however, that this term was used in a geographical and not a legal sense, much as one still speaks of the Northwest Territory. Congress has frequently referred to the "Kickapoo Reservation" in Kansas.[17] And it has often, usually in the same statute, referred to the Kickapoo Indians of Oklahoma; but never since the dissolution has it referred to a Kickapoo Reservation as existing in Oklahoma.[18] If descriptive nomenclature has any weight in this case, we think that the usage of Congress preponderates.

The dissolution of the reservation distinguishes the situation before us from that before the court relating to allotted lands within the Tulalip Reservation, *United States* v. *Celestine*, 215 U. S. 278; allotted lands within the Yakima Reservation, *United States* v. *Sutton*, 215 U. S. 291; those within the Colville Reservation, *United States* v. *Pelican*, 232 U. S. 442; and the many situations in which the Departmental rulings have held that the

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[13] 27 Stat. 561.

[14] 27 Stat. 557.

[15] 27 Stat. 558-559.

[16] 27 Stat. 562-563, 29 Stat. 868.

[17] 28 Stat. 909; 30 Stat. 590, 909, 943; 33 Stat. 213, 1074, 1254; 35 Stat. 80, 791; 36 Stat. 275, 1064; 37 Stat. 524; 38 Stat. 87, 590; 39 Stat. 123, 977; 40 Stat. 571; 41 Stat. 13, 66, 419, 523; 42 Stat. 57.

[18] 30 Stat. 77, 937; 33 Stat. 203, 1057; 34 Stat. 363, 1043; 35 Stat. 58, 802; 36 Stat. 280, 1069; 37 Stat. 529; 38 Stat. 93, 596; 39 Stat. 145, 982; 40 Stat. 578; 41 Stat. 20, 425, 1039, 1240; 42 Stat. 573, 1195; 43 Stat. 409, 708, 1160.

phrase "Indian, or other reservation" includes individual allotments.[19]

On the argument inquiry was made of counsel whether a consistent departmental practice existed in reference to grants of permission to electric companies to maintain lines along established highways. Both have called attention to a few instances of applications and grants or of assurances none were necessary said to favor their respective positions.[20] We find no consistent departmental practice which can be said to amount to an administrative construction of the Acts in question.

The judgment below is

Affirmed.

Mr. Justice BLACK and Mr. Justice DOUGLAS dissent.

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[19] 27 L. D. 421; 35 L. D. 550; 40 L. D. 39; 42 L. D. 419; 45 L. D. 563; 49 L. D. 396; 51 L. D. 41.

[20] The Government calls attention to permits given as to allotments within the Yakima and Colville reservations, which are inapplicable under our view of the case. Also to one permit to this respondent for a transmission line across a Kickapoo allotment within the boundaries of a previously authorized highway and one to it not within a highway. Respondent sets up correspondence in 1922, 1927, 1929 and 1930 claimed to indicate a contrary practice. None of this material is part of the record; and it is incomplete, and in no sense satisfactory establishment of a basis for any conclusion.